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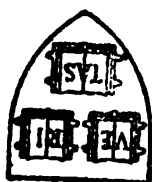
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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 241.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,
1909, AND CASES WHEREIN REHEARINGS WERE
DENIED AT THE OCTOBER TERM, 1909.

0 **ISAAC NEWTON PHILLIPS,**

REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1910.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

WILLIAM M. FARMER, CHIEF JUSTICE.

JAMES H. CARTWRIGHT,	}	JUSTICES.
JOHN P. HAND,		
GUY C. SCOTT,		
ALONZO K. VICKERS,		
ORRIN N. CARTER,		
FRANK K. DUNN,		

ATTORNEY GENERAL,
WILLIAM H. STEAD.

REPORTER OF DECISIONS,
ISAAC NEWTON PHILLIPS.

CLERK,
J. McCAN DAVIS.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A		PAGE.			PAGE.
Adkisson <i>ads.</i> Clark.....		109	Devine <i>v.</i> Healy.....		34
Aldrich <i>v.</i> Illinois Central			Dickirson <i>ads.</i> Laird.....		380
R. R. Co.....		402	E		
Ardery <i>ads.</i> Schaeffer.....		27	Economy Light and Power		
Armour & Co. <i>ads.</i> Porter.		145	Co. <i>ads.</i> People <i>ex rel.</i> ..		290
B			Ehrich <i>v.</i> Brunshwiler....		592
Bails <i>v.</i> Davis.....		536	Evanston, City of, <i>v.</i> Knox.		460
Bartkiewicz <i>ads.</i> Kosturska.		604	F		
Becker <i>v.</i> Becker.....		423	Field Museum of Natural		
Bolik <i>ads.</i> People.....		394	History <i>ads.</i> Ward.....		496
Brennen <i>v.</i> Chicago & Car-			Foss <i>v.</i> People's Gas Light		
terville Coal Co.....		610	and Coke Co.....		238
Brickey <i>v.</i> Linnertz.....		187	Fulton <i>ads.</i> Mathias.....		598
Brunshwiler <i>ads.</i> Ehrich...		592	G		
C			Gaunt <i>v.</i> Stevens.....		542
Callerand <i>v.</i> Piot.....		120	Glos <i>ads.</i> Kenealy.....		15
Case <i>ads.</i> People <i>ex rel.</i> ...		279	Goodman <i>ads.</i> Lonergan...		200
Chicago & Alton Ry. Co.			Goodwillie Co. <i>v.</i> Common-		
<i>ads.</i> Iglehart.....		268	wealth Electric Co.....		42
Chicago & Carterville Coal			Guenther <i>ads.</i> Robertson..		511
Co. <i>ads.</i> Brennen.....		610	Gustavson <i>ads.</i> City of		
Chuse Grocery Co. <i>ads.</i>			Princeton		566
Wuller		398	H		
Clark <i>v.</i> Adkisson.....		109	Haas <i>ads.</i> People <i>ex rel.</i> ...		575
Commonwealth Electric Co.			Hayden <i>v.</i> Hayden.....		183
<i>ads.</i> Goodwillie Co.....		42	Healy <i>ads.</i> Devine.....		34
Commonwealth Electric Co.			Henrotin <i>ads.</i> Wilcke.....		169
<i>ads.</i> Seith		252	Hinsey <i>ads.</i> Supreme Lodge		
D			Knights of Pythias.....		384
Davis <i>ads.</i> Bails.....		536	Hornung <i>v.</i> Decatur Rail-		
Davis <i>ads.</i> Piot.....		434	way and Light Co.....		128
Decatur Railway and Light			Huey <i>ads.</i> Powell.....		132
Co. <i>ads.</i> Hornung.....		128	Hunter <i>ads.</i> Smith.....		514

I	PAGE.
Iglehart <i>v.</i> Chicago & Alton Ry. Co.....	268
Illinois Central R. R. Co. <i>ads.</i> Aldrich	402
Illinois Central R. R. Co. <i>ads.</i> People <i>ex rel.</i>	471
Illinois Central R. R. Co. <i>ads.</i> Yeates	205

J	
Jones <i>ads.</i> People.....	482

K	
Kenealy <i>v.</i> Glos.....	15
Knights of Pythias <i>v.</i> Hinesey	384
Knox <i>ads.</i> City of Evans-ton	460
Kosturska <i>v.</i> Bartkiewicz.	604

L	
Laird <i>v.</i> Dickirson.....	380
Langwill <i>ads.</i> Williams...	441
Lee <i>v.</i> Republic Iron and Steel Co.	372
Linnertz <i>ads.</i> Brickey....	187
Loneragan <i>v.</i> Goodman....	200

M	
Maiss <i>v.</i> Metrop. Amusement Ass.	177
Manlove <i>ads.</i> Metzger....	113
Mathias <i>v.</i> Fulton.....	598
McComb <i>v.</i> McComb....	453
McGovney <i>v.</i> Village of Melrose Park	142
McLaughlin <i>v.</i> McLaughlin.	366
Meacham <i>ads.</i> People <i>ex rel.</i>	415
Melrose Park, Village of, <i>ads.</i> McGovney	142
Metropolitan Amuse. Ass. <i>ads.</i> Maiss	177
Metropolitan Elevated Ry. Co. <i>ads.</i> Sanitary District.	622
Metzger <i>v.</i> Manlove.....	113
Miller <i>v.</i> Sutliff.....	521

N	PAGE.
Nelms <i>ads.</i> People <i>ex rel.</i> ..	571

O	
Ogden <i>v.</i> Stevens.....	556
Ohio Oil Co. <i>v.</i> Scott.....	448
O'Rourke <i>v.</i> Sproul.....	576

P	
Pattison <i>ads.</i> People <i>ex rel.</i>	89
Pelouze <i>v.</i> Slaughter.....	215
Penn Mutual Life Ins. Co. <i>ads.</i> Wachsmuth	409
People <i>v.</i> Bolik.....	394
People <i>ex rel.</i> <i>v.</i> Case....	279
People <i>ex rel.</i> <i>v.</i> Economy Light and Power Co....	290
People <i>ex rel.</i> <i>v.</i> Haas....	575
People <i>ex rel.</i> <i>v.</i> Illinois Central R. R. Co.....	471
People <i>v.</i> Jones.....	482
People <i>ex rel.</i> <i>v.</i> Meacham.	415
People <i>ex rel.</i> <i>v.</i> Nelms....	571
People <i>ex rel.</i> <i>v.</i> Pattison..	89
People <i>v.</i> Peters.....	273
People <i>v.</i> Rubright.....	600
People <i>ex rel.</i> <i>v.</i> Shedd....	155
People <i>v.</i> Trafas.....	590
People <i>ex rel.</i> <i>v.</i> Wanek...	529
People's Gas Light and Coke Co. <i>ads.</i> Foss....	238
Peoria Railway Co. <i>ads.</i> Sheridan	469
Peters <i>ads.</i> People.....	273
Piot <i>ads.</i> Callerand.....	120
Piot <i>v.</i> Davis.....	434
Porter <i>v.</i> Armour & Co...	145
Powell <i>v.</i> Huey.....	132
Powers <i>ads.</i> Wolf.....	9
Price <i>v.</i> Springer.....	230
Princeton, City of, <i>v.</i> Gustavson	566

R	
Reifschneider <i>v.</i> Reifschneider	92

	PAGE.	T	PAGE.
Republic Iron and Steel Co.		Taylor <i>ads.</i> Slater.....	102
<i>ads.</i> Lee.....	372	Tebow <i>v.</i> Wiggins Ferry	
Robertson <i>v.</i> Guenther....	511	Co.	582
Rubright <i>ads.</i> People.....	600	Trafas <i>ads.</i> People.....	590
S		W	
Sanitary Dist. of Chicago		Wachsmuth <i>v.</i> Penn Mutual	
<i>v.</i> Met. Elevated Ry. Co.	622	Life Ins. Co.....	409
Schaeffer <i>v.</i> Ardery.....	27	Wanek <i>ads.</i> People <i>ex rel.</i>	529
Scott <i>ads.</i> Ohio Oil Co....	448	Ward <i>v.</i> Field Museum of	
Seith <i>v.</i> Commonwealth		Natural History	496
Electric Co.....	252	Ward <i>ads.</i> South Park	
Shedd <i>ads.</i> People <i>ex rel.</i> ..	155	Comrs.	496
Sheridan <i>v.</i> Peoria Rail-		White <i>v.</i> White.....	551
way Co.	469	Wiggins Ferry Co. <i>ads.</i>	
Slater <i>v.</i> Taylor.....	102	Tebow	582
Slaughter <i>ads.</i> Pelouze....	215	Wilcke <i>v.</i> Henrotin.....	169
Smith <i>v.</i> Hunter.....	514	Williams <i>v.</i> Langwill.....	441
South Park Commissioners		Wolf <i>v.</i> Powers.....	9
<i>v.</i> Ward	496	Wuller <i>v.</i> Chuse Grocery	
Springer <i>ads.</i> Price.....	230	Co.	398
Sproul <i>ads.</i> O'Rourke.....	576	Y	
Stevens <i>ads.</i> Gaunt.....	542	Yeates <i>v.</i> Illinois Central	
Stevens <i>ads.</i> Ogden.....	556	R. R. Co.....	205
Supreme Lodge Knights of			
Pythias <i>v.</i> Hinsey.....	384		
Sutliff <i>ads.</i> Miller.....	521		

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

HARRY WOLF, Appellee, vs. O. M. POWERS, Appellant.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. **PLEADING**—*pleading to declaration after a demurrer admits sufficiency of the declaration.* Pleading to the declaration after a demurrer is overruled waives the demurrer and admits the sufficiency of the declaration.

2. **SAME**—*demurrer is properly sustained to pleas presenting issue of law, only.* In an action on a written contract of guaranty, pleas which attempt to raise the question of law whether the contract required a certain notice named therein to be in writing are demurrable.

3. **DEFAULT**—*default admits material allegations.* A default in an action on a contract of guaranty admits the truth of allegations that the plaintiff served a sixty day notice in accordance with the terms of the agreement, and that when he gave the notice he did so because it was imperative that he should sell the stock which was the subject of the contract.

4. **SAME**—*after default the evidence should be limited to assessment of damages.* After default in an action on a written contract of guaranty the evidence should be limited to such proof as will enable the court to determine the amount of and assess damages.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

Appellee, plaintiff below, sued Arthur N. Powers and appellant, O. M. Powers, in the superior court of Cook county, jointly, upon the following contract and written guaranty of said contract:

"Memorandum of agreement by and between Arthur N. Powers and H. Wolf, both of the city of Chicago and State of Illinois:

"Whereas, Arthur N. Powers has this day sold to H. Wolf four hundred (400) shares of the capital stock of the National Fiber and Cellulose Company, of ten (\$10) dollars each, for two thousand (\$2000) dollars cash, the payment of which to said Powers is evidenced by a receipt signed by him for said amount and delivered to said H. Wolf, which said four hundred (400) shares of stock is to be held by said H. Wolf until taken up and exchanged for twenty-one (21) shares of common stock of one hundred (\$100) dollars each, and twenty-one (21) shares of six per cent non-cumulative preferred stock of one hundred (\$100) dollars each, in the American Corn Fiber Company, which said American Corn Fiber Company is now being incorporated for the purpose of acquiring all of the property, both real and personal, of whatsoever kind and nature, of the National Fiber and Cellulose Company.

"The purchase of said stock by said H. Wolf and the sale thereof by said A. N. Powers is made upon the following conditions: If at any time between ninety (90) days after date and November 1, 1906, the said H. Wolf shall need the said two thousand (\$2000) dollars, and because of said needs it shall be imperative that he sell and dispose of said shares of stock, then and in such event he hereby agrees that before offering said stock to any other person whatsoever he will serve a sixty (60) day notice upon the said A. N. Powers requesting him to take up all of the said stock for exactly the same sum now paid therefor, to-wit, two thousand (\$2000) dollars; and in consideration of this sale now made the said A. N. Powers hereby expressly agrees to accept said notice, and will, within the sixty (60) days provided in said written notice, take up all of said shares of stock and re-pay to said H. Wolf the sum of two thousand (\$2000) dollars.

"Signed, sealed and delivered in duplicate, this thirty-first day of January, A. D. 1905.

ARTHUR N. POWERS, (Seal.)

Witness: E. H. Schiff.

HARRY WOLF. (Seal.)

"In the event that the sixty (60) day notice mentioned in the foregoing instrument is served upon my nephew, Arthur N. Powers, and he fails to take up said stock, I hereby agree to take up said stock and pay therefor the sum of two thousand (\$2000) dollars.

O. M. POWERS. (Seal.)"

O. M. Powers filed a plea denying joint liability with Arthur N. Powers, and appellee thereupon dismissed the suit as to Arthur N. Powers and by leave of court filed an amended declaration of two counts, to which O. M. Powers was made the only defendant. A demurrer was sustained to the first count, and thereafter an amended first count was filed and three additional counts. To all of these O. M. Powers demurred, and upon the demurrer being overruled he filed seven special pleas. Five of these pleas, one applying to each count of the declaration, alleged that the notice provided for in the contract to be given Arthur N. Powers of the plaintiff's election to return his stock and demand the payment of \$2000 was required to be given in writing. The pleas alleged that no notice in writing was given within the time provided by the contract and denied any liability of O. M. Powers on that account. A demurrer was sustained to all five of these pleas. The other two pleas were to the second count of the amended declaration and to the second and third additional counts. When the demurrer was sustained to the five pleas appellant moved that it be carried back to the declaration, but this motion was denied and appellant elected to stand by his pleas and refused to plead further. This left the first amended count of the amended declaration and the first additional count unanswered by any plea, and appellant was defaulted as to those counts. The court thereupon heard the evidence of appellee and assessed his damages under those counts at \$1059.58 and rendered judgment therefor. That judgment has been affirmed by the Appellate Court for the First District, and the case is brought here by further appeal for review.

MILLARD R. POWERS, for appellant:

A guarantor's liability depends entirely upon the terms of his agreement. *Newlan v. Harrington*, 24 Ill. 206; *Harney v. Laurie*, 13 id. 400; *Tolman Co. v. Rice*, 164 id. 255; *Croskey v. Skinner*, 44 id. 322; *Ryan v. Trustees*, 14 id. 20.

The guarantor will only be held to the strict language of the contract. *Hance v. Miller*, 21 Ill. 636; Brandt on Suretyship and Guaranty, secs. 93, 94; *Pfaelzer v. Kau*, 207 Ill. 123; *Insurance Co. v. Johnson*, 120 id. 622.

A substantial deviation from the terms of the contract discharges the guarantor. Brandt on Suretyship and Guar. sec. 344; *Gardner v. Watson*, 13 Ill. 347; *Price v. Bank*, 124 id. 317; *Trotter v. Strong*, 63 id. 272; *Dodgson v. Henderson*, 113 id. 360; *McCarthy v. Ridgway*, 160 id. 129.

The terms of a sealed instrument cannot be varied by parol. *Barnett v. Barnes*, 73 Ill. 217; *Loach v. Farnum*, 90 id. 368; *Railroad Co. v. Railroad Co.* 137 id. 9; *Chapman v. McGrew*, 20 id. 101; *Hume Bros. v. Taylor*, 63 id. 43.

FOSTER, BRADLEY & STETSON, for appellee.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court:

The contract provided that in order to authorize appellee to demand the \$2000 he must, between ninety days after the date of the contract and November 1, 1906, serve a sixty day notice on Arthur N. Powers requesting him to take up the stock and pay the sum of \$2000, and Arthur N. Powers agreed to accept said notice, and "within the sixty (60) days provided in said written notice" take up the stock and pay appellee \$2000. The first amended count of the amended declaration set out that the contract required sixty days' notice to be given but contained no reference to the notice being required to be given in writing. It averred that on October 19, 1905, appellee being in need of the \$2000, and because of such need it was imperative that he sell and dispose of said stock, he served upon Arthur N. Powers a sixty day notice, "in accordance with the terms of said agreement, requesting him to take up the stock for exactly the sum paid therefor; that said Arthur N. Powers then and there accepted said notice by promising the plaintiff to take up the stock and re-pay to the plaintiff

the \$2000 within sixty days thereafter." The first additional count contained averments similar in substance to the amended first count, and both counts alleged that upon the failure of Arthur N. Powers to pay the sum of \$2000 appellee notified appellant that he had given the notice to Arthur N. Powers and requested him to pay said sum, but that he refused so to do. The amended first count of the amended declaration sets out what purports to be the substance and legal effect of the agreement, and the first additional count sets out the agreement *in hæc verba*.

By pleading to the declaration after the demurrer to it was overruled, appellant waived the demurrer and admitted the sufficiency of the declaration. *Green Co. v. Blodgett*, 159 Ill. 169; *Indianapolis and St. Louis Railroad Co. v. Morgenstern*, 106 id. 216; *Gardner v. Haynie*, 42 id. 291; *Geary v. Bangs*, 138 id. 77; *Snyder v. Gaither*, 3 Scam. 91; *Camp v. Small*, 44 Ill. 37.

Appellant contends that as guarantor he could only be bound by a strict compliance with the terms of the agreement, which required the notice to be given in writing, and he attempted, by pleas to which demurrers were sustained, to raise the question of law whether the notice was required to be given in writing. We do not think there was any error in sustaining demurrers to these pleas, as they presented issues of law, only. Had the general issue been pleaded this question would have been presented to the court for decision when the proof was offered. That plea would have put appellee upon proof of the allegations that the notice served on Arthur N. Powers was in accordance with the requirements of the agreement, and if the court had construed the agreement, when the proof was offered, to require notice in writing and the proof showed the notice given was not in writing, there would have been a failure of proof of material allegations.

Appellee testified that on the 4th day of January Arthur N. Powers paid him \$1025 and promised to pay the

balance before the February following. Failing to make the payments, appellee demanded the balance due of appellant, and he also promised to pay it, but failing to do so this suit was commenced. There was some other testimony admitted, over the objections of appellant, not necessary to the assessment of damages, but the appellant was not prejudiced thereby, as no complaint is made of the amount of damages assessed, if there was any right to recover. The counts as to which appellant was defaulted allege that appellee had served a sixty days' notice on Arthur N. Powers, in accordance with the terms of the agreement. The default admitted this allegation to be true, and only such evidence was competent as would enable the court to determine the amount of, and assess, the damages. *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164; *Binz v. Tyler*, 79 id. 248; *Cook v. Skelton*, 20 id. 107; *First Nat. Bank v. Müller*, 235 id. 135; *Cairo and St. Louis Railroad Co. v. Holbrook*, 72 id. 419.

It is also contended by appellant that there was no proof that appellee was ready and willing to surrender his stock and that he needed the money so badly that it was imperative for him to sell. The first amended count of the amended declaration avers that appellee is, and always has been since giving the notice and making the demand, ready, able and willing, upon the payment to him of the \$2000, to deliver up to Arthur N. Powers or the appellant the said shares of stock, and the first additional count avers that he is, and always has been, ready and willing to deliver up said stock upon the payment being made. One of the said counts alleges that when appellee gave the notice he did so because he needed the \$2000 and because it was imperative that he sell the said stock. These allegations were admitted by the default and proof of them was not required.

We are of opinion the trial court did not err in rendering judgment in favor of appellee, and the judgment of the Appellate Court affirming that judgment is affirmed.

Judgment affirmed.

JERRY KENEALY, Appellee, vs. JACOB GLOS *et al.* Appellants.

Opinion filed June 16, 1909—Rehearing denied October 8, 1909.

1. **RES JUDICATA**—*when decree dismissing bill to remove cloud is not res judicata.* A decree dismissing a bill to cancel a tax deed as a cloud on title in accordance with a direction of the Supreme Court in a judgment of reversal based upon the ground that the complainant did not at that time have title or possession, is not *res judicata* such as bars a second bill between the same parties to set aside the same tax deed after plaintiff has perfected his title and obtained possession. (*Gage v. Ewing*, 114 Ill. 15, followed.)

2. **PRACTICE**—*section 39 of the Chancery act and section 38 of the Evidence act must be construed together.* Section 39 of the Chancery act and section 38 of the Evidence act must be construed together, and when so construed they mean that when a case is referred to the master to take evidence and report his conclusions or state an account the master must take all the evidence, including oral testimony, and if the oral testimony is properly reported by the master to the court it is taken "on the trial," within the meaning of section 38 of the Evidence act.

3. **SAME**—*what is not a material departure from procedure in hearing chancery suit.* The fact that the chancellor, after hearing part of the evidence in a proceeding to cancel a tax deed as a cloud, referred the case to a master to take the remainder of the evidence, after which the cause was heard in its entirety by the chancellor on the evidence reported and that previously heard, is not a substantial departure from proper procedure, where the master was not required to, and did not, report any conclusion, but merely the evidence in the form of questions and answers.

4. **EVIDENCE**—*when record of former action is not admissible.* Where pleas setting up a former proceeding as *res judicata* have been overruled and there is no issue of fact upon such question the record of such former proceeding is not admissible; but, the evidence being incompetent, it will be assumed, on appeal, that the chancellor disregarded it.

5. **CLOUD ON TITLE**—*what is sufficient to enable party to maintain bill.* One who is in possession of property claiming in good faith to be the owner thereof under a master's deed purporting to convey the title to him may maintain a bill to cancel a tax deed as a cloud upon his title.

6. **TAX DEEDS**—*person in possession claiming ownership is entitled to notice.* One who is in possession of land claiming to be the owner thereof at the time when the notice required by sec-

tion 216 of the Revenue act should be served, is entitled to notice whether he is or is not an owner of the premises within the meaning of such section.

7. *SAME—defendant should not be required to pay master's fees in absence of tender.* A decree canceling a tax deed as a cloud upon the complainant's title should not adjudge the master's fees against the defendants, where there is no proof that the complainant, before filing the bill, tendered the taxes, costs and interest or that the money therefor was paid into court.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

JACOB GLOS, for himself; JOHN R. O'CONNOR, for other appellants.

MATTHEWS & KIMBELL, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Jerry Kenealy filed a bill against Jacob Glos and others to set aside a tax deed, alleging that the affidavit filed upon which said tax deed issued did not show a compliance with the statute in reference to the service of notice. The bill alleges that the complainant was the owner and in possession of lot 6, in block 82, in the subdivision made by the Calumet and Chicago Canal and Dock Company of parts of sections 5 and 6, township 37, north, range 15, east, in Cook county, Illinois; that he acquired title through a master's sale pursuant to a decree of foreclosure, from which no redemption had been made. It is alleged in the bill that these premises were sold on September 18, 1901, to Jacob Glos for the delinquent general taxes for the year 1900 and that a tax deed was issued in pursuance thereof to the said Jacob Glos. The averments in the bill as to the invalidity of the tax deed are supported by the evidence, and no question relating to that branch of the case is involved in this appeal. To the original bill Jacob Glos filed a plea supported by an answer. Subsequently, upon the

bill being amended, Jacob Glos filed a plea which was overruled, and he elected to stand by his plea. The plea of Jacob Glos alleged that in the former suit between the same complainant and defendant to set aside the same tax deed, complainant then being the holder of the certificate of sale issued in the foreclosure proceeding, a decree was entered in favor of complainant setting aside the tax deed involved in this proceeding, which decree was subsequently reversed by the Supreme Court and the cause remanded, with directions to dismiss the bill for want of equity, and that thereafter the mandate of the Supreme Court was filed in the superior court of Cook county, and on November 3, 1906, an order was entered dismissing said bill for want of equity. The original bill filed in the case now before the court made no reference to the previous proceedings set up in the plea. After the plea of Jacob Glos was filed, accompanied by an answer setting out and relying upon the former adjudication in bar of the present bill, and a like plea, also coupled with an answer, having been filed by Emma J. Glos, who was also joined as a defendant, the complainant amended his bill setting out the previous proceedings, and alleged that the reversal of the former decree by this court was without a consideration and determination of the merits of the controversy, and alleged that the decree in the former proceedings was reversed solely because the complainant was not the owner of the premises and held only a master's certificate of purchase at a foreclosure sale, which was by this court held to give complainant no standing in a court of equity to file a bill to remove a cloud from title, and for the further reason that this court held that the possession of a receiver during the period of redemption was not such possession by or on behalf of the holder of the certificate of purchase as to enable him to maintain said bill. By the amended bill it is averred that in the briefs filed in the original case on behalf of Jacob and Emma J. Glos it was argued that until

the period of redemption should have expired "Mr. Kenealy should be directed by this court [the Supreme Court] to depart until his rights have matured, and the bill should be dismissed," and averred that upon this contention, alone, the Supreme Court reversed the decree of the superior court and remanded the cause, with directions to dismiss the bill for want of equity. These pleas were thereupon overruled. Clara L. Gos, August A. Timke and D. Arnold answered the bill, denying the material allegations and demanding strict proof. After replications to these answers were filed the hearing of the cause was entered upon in open court. After a portion of the evidence had been heard by the court, the court, upon its own motion but without objection by either party, referred the case to a master in chancery, before whom the remainder of the evidence was heard, and he reported to the court without any conclusions or recommendations. Thereafter the cause was heard before the same judge upon the evidence reported by the master, together with that previously heard by the court. On a final hearing in the court below the defendants' counsel offered in evidence the whole record containing the evidence offered in the prior case of *Kenealy v. Gos*. This evidence was offered and received by the court over the objection of complainant's counsel. The circuit court entered a final decree granting the relief prayed for in the bill. The case comes to this court upon the several appeals of Jacob Gos, Emma J. Gos, D. Arnold and August A. Timke.

The appellants' first and most serious contention is that the decree of dismissal of the original bill is *res judicata*. When the suit set up in the pleas was before this court, (*Gos v. Kenealy*, 220 Ill. 540,) after stating facts, this court, on page 541, said: "It has been frequently held by this court that there are but two cases, under our statute, in which a bill to remove a cloud from title can be maintained, viz., where the complainant is in possession of the premises or where they are vacant or unoccupied. (*Gage*

v. *Abbott*, 99 Ill. 366; *Glos v. Randolph*, 133 id. 197; *Glos v. Huey*, 181 id. 149; *Glos v. Beckman*, 183 id. 158; *Glos v. Kemp*, 192 id. 72.) This rule presupposes that the complainant seeking to have the cloud removed has title to the property, (*Hutchinson v. Howe*, 100 Ill. 11; *Walker v. Converse*, 148 id. 622; *Glos v. Goodrich*, 175 id. 20;) although where the cloud sought to be removed is a tax deed, proof that the complainant, at the time of filing the bill, was in possession of the property, claiming in good faith to be the owner thereof under a deed purporting to convey the same to him, is sufficient proof of title. (*Glos v. McKerlie*, 212 Ill. 632.) In the case at bar complainant was neither in possession of the lot nor was it vacant and unoccupied. His only interest in the property was as the holder of a master's certificate of purchase, which did not purport to convey title and which was not color of title.—*Lightcap v. Bradley*, 186 Ill. 510."

It will thus be seen that the decree was reversed because appellee at that time had neither title nor possession. The cause of the dismissal was the absence from the bill of the allegation of ownership and an averment that the appellee was in the possession of the premises or that they were vacant and unoccupied. The effect of that decree was an adjudication that appellee was not then entitled to maintain his bill. At that time appellee did not have the legal title and it could not be known that redemption would not be made, thereby preventing the possibility that title would ever vest under the master's sale. Appellants' right to maintain a bill after appellee was clothed with the legal title to the possession of the premises was neither presented nor considered in the proceedings set out in the pleas.

The case, on the question now being considered, is, in our opinion, controlled by *Gage v. Ewing*, 114 Ill. 15. In that case a bill was filed to remove two tax deeds. To this bill a plea was filed setting up the dismissal, for want of equity, of a former bill by the same complainant against the

grantor of the defendant. The reason for dismissing the first bill was, that it did not contain an allegation that the complainant was in possession or that the premises were vacant and unoccupied. The second bill contained the allegation the absence of which caused the dismissal of the first. In disposing of the question presented by the plea, this court, on page 18, said: "It appears that in this bill there is an allegation that the premises are unimproved and unoccupied, while in the bill set up in the second plea that allegation is wholly wanting; and the only question discussed upon this record is whether, in the absence of that allegation, the suit set up in the second plea is a bar to the present suit. Our answer must be in the negative. When the suit set up in the second plea was before us, (*Gage v. Abbott*, 99 Ill. 366,) we held that because the bill failed to show that the complainant was in possession or that the premises were unimproved and unoccupied, the decree of the circuit court granting the relief prayed for was erroneous; that one or the other of these allegations was essential to give the court jurisdiction. That bill not having been subsequently amended but dismissed in conformity with our ruling, the decree therein cannot be urged in bar of the relief sought by this bill. It contains the precise allegation because of the absence of which that bill was held to be defective. The dismissal of a bill because of some defect precluding relief is no bar to a second bill in which such defect is cured, notwithstanding in other respects the material allegations are the same.—*Emory v. Keighan*, 88 Ill. 516; 1 Daniell's Ch. Pr. (Perkins' ed.) 660."

Proof of title in appellee could not have been presented in the former case because the facts did not then exist, and the same is true in regard to possession. The present suit is based upon rights acquired by appellee since the former proceeding was disposed of.

The appellants rely on *Tilley v. Bridges*, 105 Ill. 336, *Knowlton v. Hanbury*, 117 id. 471, and *Bradish v. Grant*,

119 id. 606. In the case of *Tilley v. Bridges* a bill was filed by a purchaser at an administrator's sale to set aside said sale on the ground that a mistake had been made in the description of the property in the petition and decree. This bill was dismissed upon a hearing for want of equity. The second bill was filed by the purchaser to recover the purchase money, taxes paid and the value of improvements made, basing his bill upon the same mistake which had been alleged in the first bill. This court held that the question as to the alleged mistake having been once litigated and determined, the judgment was, on the principle of estoppel by verdict, conclusive of that question in all subsequent litigation between the same parties, whether concerning the same or other and different causes of action. That case is not applicable to the situation presented by this record. An adjudication that appellee had no such title or possession as was required to maintain the bill is not a determination of any fact that will estop appellee from setting up a title and possession subsequently acquired, even though in other respects the averments of the bills are substantially the same.

In the case of *Knowlton v. Hanbury* a bill was filed in the United States circuit court for the purpose of rescinding, because of fraud and misrepresentation, a contract by which Knowlton exchanged certain real estate in Chicago for twenty-seven vacant lots belonging to Hanbury, located in Clarendón Hills, Mass. Upon a hearing in the United States court that bill was dismissed. Subsequently, Hanbury filed a bill in the State court against Knowlton to enjoin him from conveying the Chicago lots. Knowlton filed a cross-bill, making the same allegations as to fraud and misrepresentation that he had made in his bill in the United States circuit court. To this cross-bill Hanbury filed a plea setting out in detail the proceedings that were had in the United States circuit court. The plea was sustained and the cross-bill dismissed. This court held that

the plea presented a good defense to the cross-bill. That case is wholly unlike the one at bar. There the cross-bill was founded upon a state of facts which had been passed upon by a court of competent jurisdiction, and the decree was therefore *res judicata* of that question between the parties.

The case of *Bradish v. Grant* was an action of ejectment. On the trial the defendant sought to impeach a decree in chancery against him by proving that there was no service on him in the chancery suit and that his appearance had been entered by an attorney fraudulently and without authority. This evidence was rejected. It appeared that the defendant had previously filed a bill for the purpose of impeaching the decree on the same ground on which he sought to avoid its effect in the trial of the ejectment case, and this court held that the decree against him in the chancery suit, filed for the purpose of impeaching the former decree, was a bar, and that the court below properly refused to hear the evidence offered.

In all of these cases the right of action was predicated upon a state of facts which had been previously presented and determined, while in the case at bar the facts upon which appellee's cause of action depends had no existence at the time of the former proceeding, and could not, for that reason, have been determined therein. In this respect the case at bar is like *Hawley v. Simons*, 102 Ill. 115, where it was held that a judgment in ejectment against the plaintiff was not a bar to a similar suit between the same parties, where the plaintiff relied upon a subsequently acquired title; and *Cochran v. Fogler*, 116 Ill. 194, where this court decided that an adverse judgment against the plaintiff in an action of forcible detainer, brought by a purchaser at a foreclosure sale without complying with the conditions of the decree, was no bar to an application for a writ of assistance after the plaintiff had complied with the decree and perfected his title. The general rule is, that

a judgment or decree of a court of competent jurisdiction is conclusive between the parties and their privies, not only as to all matters that were, in fact, determined, but as to all matters which might have been determined in the proceeding as well. (*Thompson v. Hemenway*, 218 Ill. 46.) This rule is founded upon two maxims of the common law, one of which is that a man should not be twice vexed for the same cause, and the other is that it is for the public good that litigation should be terminated. There are two well defined branches of this rule: (a) Where the rule is invoked in respect to a cause of action which has been once finally determined on its merits by a court of competent jurisdiction. To sustain a plea under this branch of the rule it is necessary that there should be an identity of parties, of subject matter and cause of action. (*Baldwin v. Hanecy*, 204 Ill. 281.) (b) Where the rule is invoked in respect to some fact once in issue and authoritatively determined between the same parties. The latter branch of the rule is generally designated as estoppel by a verdict. (*Riverside Co. v. Townshend*, 120 Ill. 9; *Wright v. Griffey*, 147 id. 496.) It is not essential to the application of the doctrine of estoppel by a verdict that there should be identity of cause of action or subject matter. The whole philosophy of the doctrine of *res judicata* may be summed up in the statement that a matter once decided, whether right or wrong, must remain decided unless reversed in a direct proceeding for that purpose. This rule in neither aspect can have any application to the case before us.

Appellants' next contention relates to the method of procedure. It is insisted that the court erred in basing the decree partly on evidence heard by the court and partly on evidence taken and reported by the master. Section 39 of chapter 22, Hurd's Revised Statutes of 1908, provides that the court may, "upon default, or upon issue being joined, refer the cause to a master in chancery or special com-

missioner, to take and report evidence, with or without his conclusions thereupon." Section 38 of chapter 51 of Hurd's Revised Statutes provides that "on the trial of every suit in chancery, oral testimony shall be taken when desired by either party." These two sections of the statute must be construed together. When so construed they mean that when a cause is referred to a master in chancery to take the evidence and report his conclusions or state an account he must take all of the evidence; and this is true whether the evidence is in the form of depositions or documents, or is to be detailed orally by the witnesses introduced before him. The right of a party to introduce oral evidence on the trial is secured to him by giving him the privilege of offering such oral evidence before the master in cases which have been referred to him, and when such evidence is thus introduced and afterwards properly reported by the master to the court, it is, in the language of section 38 of chapter 51, *supra*, taken "on the trial." Thus construed, both sections are consistent and the benefits of a reference to a master are preserved. *Prince v. Cutler*, 69 Ill. 267; *Cox v. Pierce*, 120 id. 556; *Brueggestradt v. Ludwig*, 184 id. 24.

The method of procedure in the case at bar did not violate, except in an immaterial particular hereinafter pointed out, the established rules of procedure. This case was heard in its entirety before the court. It is true that a part of the evidence was taken, in the first instance, before the master, but this evidence was submitted to the court in the form of questions and answers reported by the master. If the reference had been made before any evidence was taken, the proper practice would have been for the parties to submit all of their evidence before the master; but since the court had already heard a part of the testimony before the reference was made, the reference was only for the purpose of taking and reporting the evidence that had not previously been heard by the court. If the reference had

been for the purpose of taking the evidence and reporting his conclusions thereon, it would, no doubt, have become necessary for the master to re-take that part of the evidence that had been heard by the court; but inasmuch as the master was not required to draw any conclusions or make any recommendations, it would have been a waste of time and money to re-take and report to the court evidence which the court had already heard.

A court of chancery may, in its discretion, hear all of the evidence on one question or branch of a case and then refer the case to a master to take and report the evidence upon other questions involved. This is a common and well established practice in bills for accounting between partners. The court hears the preliminary evidence and determines whether there ought to be an accounting, and if it be determined that an accounting should be had, it is the usual practice to then refer the case to a master to take the evidence and state the account. This practice has been approved by this court. (*McGillis v. Hogan*, 190 Ill. 176.) When the case was referred to the master to take and report the evidence without any limitations in the reference, the parties were not required to introduce all of the remaining evidence before the master. The pleas setting up the former adjudication had been overruled. This was equivalent to sustaining a demurrer at law. There was, therefore, no issue of fact before the court to which the evidence was pertinent. This evidence being incompetent it must be assumed that the court disregarded it.

Appellants contend, in the next place, that the court erred in finding that Fred Seip was the owner of the premises described in the bill of complaint and that he was entitled to be served with notice of the expiration of the time of redemption. This point is, in our opinion, immaterial. Appellee does not claim title through Fred Seip, although his name appears as one of a chain of *mesne* conveyances. The appellee was in possession of the property

claiming in good faith to be the owner thereof under a master's deed purporting to convey to him the title, and this is sufficient to enable him to maintain a bill to remove a tax deed as a cloud upon his title. (*Glos v. McKerlie*, 212 Ill. 632; *Glos v. Kenealy*, *supra*.) The undisputed evidence shows that Fred Seip was in possession claiming to be the owner when the notice should have been served. This made it necessary that notice be served upon him, under section 216 of the Revenue law, whether he was in possession as owner or otherwise. The evidence shows that no notice was served upon Mr. Seip. We do not find it necessary to determine the question whether Fred Seip was the owner of these premises, within the meaning of section 216 of the Revenue law, so as to entitle him to notice as such owner, because, whether he was the owner or not, he was in the actual possession and entitled to notice and no notice was served upon him.

It is finally contended by the appellants that the court erred in adjudging the master's fees, amounting to \$23.10, against appellants. In this we think the court erred. There was no proof that appellee made a tender of the amount of taxes and costs, with the interest thereon, before the filing of this bill, nor was the money due appellants paid into court. The rule has been established in cases of this character, that where the owner desires to place the holder of a tax title in the wrong, so as to relieve himself from the payment of costs, he should, where it is practicable to do so, make a tender of the taxes, costs and interest before filing his bill and keep such tender good by bringing the money into court, and if he fails in these requirements it is error to decree costs against the defendant. *Cotes v. Rohrbeck*, 139 Ill. 532; *Gage v. Goudy*, 141 id. 215; *Glos v. O'Brien Lumber Co.* 183 id. 211; *Bauer v. Glos*, 236 id. 450.

For the error in decreeing this cost against appellants the decree of the circuit court is reversed and the cause

remanded, with directions to modify the decree so as to require appellee to pay the master's fees. In all other respects the decree is affirmed.

Reversed in part and remanded, with directions.

MARY H. SCHAEFFER, Guardian, Defendant in Error, *vs.*
R. F. ARDERY, County Collector, Plaintiff in Error.

Opinion filed June 16, 1909—Rehearing denied October 7, 1909.

1. *TAXES—when equity has jurisdiction of bill to enjoin collection of taxes.* A court of equity has jurisdiction of a bill to enjoin the collection of taxes extended on an original assessment by the board of review and an assessment increased by such board, where the complainant has exhausted her remedy at law so far as the board of review is concerned, having appeared before it and been fully heard.

2. *SAME—equity has jurisdiction if tax was unauthorized by law.* The fact that the board of review may have final authority to value property does not preclude a court of equity from taking jurisdiction to grant relief to the party assessed by such board if the tax is unauthorized by the law.

3. *SAME—amount which minor must contribute towards debts of estate should not be assessed as his personal estate.* In determining the amount to be assessed against a minor as his personal property the amount which he is required to contribute toward the payment of the debts of his father's estate should be deducted, and the proportion which his interest should so contribute is properly measured by his interest in the property left to him.

4. *SAME—when judgment in favor of widow should not be assessed as an asset.* Where the widow uses funds in her hands as guardian to pay debts of the deceased which have not been allowed as claims against the estate, the fact that she improperly filed a claim for the amount and obtained a judgment therefor against the estate does not justify the board of review in assessing the amount of such judgment to her as a personal asset.

WRIT OF ERROR to the Circuit Court of Boone county;
the Hon. ROBERT W. WRIGHT, Judge, presiding.

P. H. O'DONNELL, State's Attorney, and WILLIAM
BIESTER, for plaintiff in error.

JOHN FAISSLER, and JOHN R. COCHRAN, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Defendant in error, in her own right and as guardian of the minor, Willard Longcor, filed her bill at the April term of the Boone county circuit court to enjoin the plaintiff in error from collecting certain taxes extended by the county collector of that county upon an increased assessment made against her individually by the board of review of the said county and upon an original assessment made against her as guardian by said board. The amount of the original assessment against the defendant in error as guardian in excess of an assessed valuation of \$2140, and the amount of the increased assessment against her personally, were held void by the decree of the lower court. From that decree this writ of error has been sued out.

Willard T. Longcor died testate August 14, 1905, leaving him surviving his widow, defendant in error, (who has since remarried, her present name being Mary H. Schaeffer,) and their son, Willard, a minor. He owned at the time of his death several hundred acres of farm land and some city real estate in Boone and DeKalb counties, in this State, and personal property worth approximately \$5000. He also left life insurance of \$30,000, payable to said son. Briefly, his will provided, substantially, that his debts should be first paid out of his personal property, and that his wife should have the use and income of all the rest and remainder of the personal property during her life, with remainder, after her death, to their son, Willard. By the third, fourth and fifth clauses of the will he devised certain of his real estate to defendant in error in trust, to take charge of and manage for the son, and provided that she should have one-third of the net income thereof and that the net income of the other two-thirds should be paid to said son; that when the son became thirty years of age the title to certain

of said real estate should vest in him absolutely, and that certain of the other real estate should vest in him when he became thirty-five years of age, and the rest of the real estate mentioned in said three clauses of said will should vest in him when he became forty years of age. The will, however, further provided, substantially, that during the life of defendant in error she should have what was equivalent to one-third of the net income of said real estate, even after the title had vested in the son. By the sixth clause of the will it was provided that one-half of all the rest and remainder of the real estate should go, in trust, to defendant in error, to take charge of and manage and pay over the net income to the son until he was twenty-five years of age, when the title to said one-half of said residue should be vested in the son absolutely. The other half of said residuary real estate he devised to defendant in error absolutely. The widow was nominated as executrix and trustee under the will and guardian of the minor, and qualified in all of those capacities. On September 30, 1905, she was paid, as guardian, the life insurance money of \$30,000. At the time of his death Mr. Longcor was indebted in an amount exceeding \$25,000. The decree finds that on and prior to January 9, 1906, defendant in error paid and discharged debts and liabilities of her husband's estate amounting to \$25,615.93, none of these claims having been filed against said estate; that to make up this amount she used \$23,956.30 of the moneys in her hands as guardian and the balance she contributed from her own personal funds. On January 9, 1906, on the same day she paid the last of these bills, she filed in the county court of Boone county a claim against her husband's estate for reimbursement of the several amounts so paid by her, aggregating \$25,615.93. On the same day the claim was allowed and a formal judgment entered against the estate for that amount.

Defendant in error returned to the local assessor at Belvidere, in said Boone county, a schedule of personal prop-

erty subject to taxation for 1907, at the full valuation of \$2732. This amount she claims was all she was required to list. She made no return of any schedule of personal property as guardian of said minor. The board of review of Boone county increased her personal assessment for 1907 by the amount of said judgment or claim, namely, \$25,615.93, and made an original assessment on the personal property against her, as guardian of said minor, of \$28,790.

The circuit court by its decree found that the personal property of defendant in error's husband's estate should first have been applied to the debts and liabilities, and that the said minor and the defendant in error herein should thereafter have contributed, share and share alike, the sum of \$13,600 to meet said liabilities, which said last mentioned sum was equivalent to the residuary estate at the time of the death of the testator, and that the amount of the debts and liabilities thereafter remaining should have been paid by defendant in error contributing thereto .1872- $\frac{3}{4}$ part thereof and said minor contributing thereto .8127- $\frac{1}{4}$ part thereof; that of the debts and liabilities of said estate paid and discharged by defendant in error on and before January 9, 1906, amounting to \$25,615.93, said minor should have contributed the sum of \$15,903.49 and the defendant in error \$8896.57; that defendant in error had received as guardian, prior to said April 1, 1907, \$30,085.57, and that she had paid out from said funds prior to said date \$26,083.01, which last amount had been approved by the county court of Boone county; that said purported claim of \$25,615.93 was not on January 9, 1906, nor has it at any time since been, an asset or credit of defendant in error, nor has it been a liability of any kind or nature against the estate of said William T. Longcor, deceased. Other details as to the amounts received and paid out by defendant in error as guardian, or as trustee and executor of the estate, are found in the record, but it is unnecessary to set them out in this opinion.

Counsel for plaintiff in error contend that a court of chancery is without jurisdiction to render the decree here in question, because the defendant in error did not attempt to obtain the relief as the law required. The pleadings and evidence before us show that on August 5, and again either on August 21 or August 28, defendant in error, through her attorney, appeared before the board of review, and the question was discussed at one or both of these meetings by the board of review and her attorney as to what property she had personally and as guardian of the said minor. There was no dispute as to the form of the schedule, or that she had to make out one schedule as guardian and a different schedule as to her personal property. The only difference of opinion appears to have been as to whether the judgment entered in the county court against said estate of her husband and in her favor for \$25,615.93 should be assessed as an asset against her individually and as to the amount that should be assessed against her as guardian. We cannot agree with counsel for plaintiff in error that *mandamus*, on this state of facts, was the proper remedy. This case, on the facts set out, is plainly within the rules laid down by this court in *Condit v. Widmayer*, 196 Ill. 623, *Weber v. Baird*, 208 id. 209, and *Carney v. People*, 210 id. 434. The tax-payer here, as in the first of those cases, had exhausted her remedy, so far as the board of review was concerned. She had appeared before it and been fully heard.

It is next urged that a court of chancery is without jurisdiction because the board of review has the final authority to value property, and that chancery will not interfere in fixing values. While this may be true in certain cases, still, if the tax is unauthorized by law, as the decree found it was in this case, the person assessed can obtain relief in a court of equity. This is, in effect, held by the decisions last cited and has been decided many times by this court. The principles governing courts of equity on such matters are

discussed in *Drainage Comrs. v. Kinney*, 233 Ill. 67, and many authorities are there cited.

We think the chancellor in his decree found correctly as to the proportionate part of the debts and liabilities of the estate that should have been paid by defendant in error personally and as guardian of said minor. The proportion in which the interests of the parties should contribute towards the debts of said estate, under the facts of the case, was properly measured by their respective interests in the property left to them by decedent. There was only about \$5000 worth of personal property belonging to the estate, and had not the insurance money been used to pay the debts and liabilities of the estate it is obvious that some of the real estate would have had to be sold for that purpose. In order to find the proper amount that should be assessed as personal property of the minor's estate held by defendant in error as guardian, it was necessary to find the amount that should be contributed by said minor's estate towards paying the debts of the father's estate. This proportionate amount was properly deducted by the chancellor from the amount that should be assessed as the personal estate of said minor. It is not seriously contended by counsel for plaintiff in error that the court did not follow correct rules of law in reckoning the interest of said minor and the proportion that he should pay towards said debts. The argument on this branch of the case (except the one already discussed, that a court of equity was without authority to change the finding of the board of review,) was, that the record does not show sufficient facts to justify the finding of the court as to the propositions in question. We deem it sufficient to say, without going into details, that the facts found in the record fully support the findings of the decree on this point.

Counsel for plaintiff in error strenuously insist that the holding of the chancellor that said claim for \$25,615.93 was not a credit or an asset of said defendant in error on

April 1, 1907, was wrong, counsel's argument being that defendant in error, by borrowing this money of her ward and then obtaining a judgment against her husband's estate for the amount, created a new property for herself equal to the amount of said judgment. Counsel, in effect, admit in their argument that if defendant in error had not filed this claim against the estate and thereafter had judgment entered in her favor it could not have been an asset and a part of her personal estate. Assets cannot be created by mere book-keeping. Defendant in error should not have made this claim against her husband's estate nor had a judgment entered in her favor, personally, for the amount of \$25,615.93. Some \$23,956.30 of that amount was paid from the funds of the minor's estate in defendant in error's hands as guardian, and could not have been an asset of defendant in error. Manifestly, on the facts heretofore set out, the claim in the form filed and the judgment entered thereon were both incorrect and misleading, but this did not justify the board of review in assessing the amount of that judgment as an asset of defendant in error. The argument of counsel on this branch of the case, based on the method of taxing not only the entire value of the mortgaged land to the owner of the land but the value of the mortgage to the owner of the mortgage, and the arguments as to double taxation and the taxation of credits, have no bearing on the question here under discussion. No other question than the assessing of this judgment as a personal asset of defendant in error is raised as to her personal property schedule.

The decree restraining the collection of the taxes in question, as set forth above, was therefore properly entered. Our holding on this question renders it unnecessary for us to consider or decide the cross-errors urged by defendant in error.

The decree of the circuit court will be affirmed.

Decree affirmed.

JOHN F. DEVINE, Admr., Plaintiff in Error, vs. MARY E. HEALY, Exrx., Defendant in Error.

Opinion filed June 16, 1909—Rehearing denied October 7, 1909.

1. SURVIVAL OF ACTIONS—*administrator of deceased may maintain suit for damages against executor of wrongdoer.* Since the enactment of section 122 of the Administration act, relating to actions which survive, an administrator of a person whose death has been caused by the wrongful act, neglect or default of another may maintain an action against the latter's executor, under section 2 of the Injuries act, to recover damages for the exclusive benefit of the widow and next of kin of the person whose death has been wrongfully caused. (*Holton v. Daly*, 106 Ill. 131, explained.)

2. SAME—*rule where person injured dies.* If a person injured by another's negligence dies as the result of his injury the only action which can be maintained is the action for the benefit of the widow and next of kin which is given by the statute of 1853; but if he dies from some cause other than the injury the cause of action for damages to the time of his death survives under section 122 of the Administration act.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This was an action brought on April 12, 1907, by James Reddick, administrator of the estate of Frank Riggs, deceased, in the superior court of Cook county, against defendant in error, Mary E. Healy, executrix of the will of John M. Healy, deceased, to recover damages for the death of the said Riggs, alleged to have been caused through the negligence of said John M. Healy. Later John F. Devine succeeded Reddick as administrator and was substituted in this suit.

The declaration as finally amended alleges, in substance, that on April 20, 1906, John M. Healy was a general contractor engaged in laying a water main in the city of Libertyville, in Lake county, Illinois; that on that date Frank

Riggs was in the employ of Healy as a caulker, and while working at the bottom of a ditch which had been dug by the employees of Healy, and while he was in the exercise of due care, his death was occasioned by the negligence of Healy. The alleged acts of negligence were set out with sufficient particularity. It was further averred that Riggs left surviving him his father, his mother and certain brothers and sisters, all of whom were dependent upon him, in whole or in part, for their support, and that they had been deprived of their support by reason of his death; that said John M. Healy died on July 16, 1906, and that prior to the commencement of this suit defendant in error was duly appointed and qualified as executrix of his last will, and that she was acting in that capacity at the time the suit was begun.

To the declaration, as amended, defendant in error interposed a general demurrer, which was sustained. Thereupon plaintiff in error elected to stand by his pleading, and judgment was entered against him for costs and the suit dismissed. That judgment has been affirmed by the Branch Appellate Court, and the case has been brought to this court by a writ of error.

It is contended by plaintiff in error that the superior court erred in sustaining the demurrer and in entering judgment against him.

RUNNELLS, BURRY & JOHNSTONE, (G. M. PETERS, of counsel,) for plaintiff in error:

Had death not resulted from the injury the present defendant would have been liable. Death resulting, an action under the death statute lies against defendant. Rev. Stat. chap. 70, secs. 1, 2; *McIntyre v. Sholty*, 121 Ill. 660; *Norton v. Wiswall*, 14 How. Pr. 42; *Russell v. Sunbury*, 37 Ohio St. 372.

By the Survival statute in this State actions for injuries to the person survive. This is an action for injuries to the

person, and therefore survives. Rev. Stat. chap. 3, sec. 122; *Holton v. Daly*, 106 Ill. 131; *Moe v. Smiley*, 125 Pa. 136; *Russell v. Sunbury*, 37 Ohio St. 372; *Norton v. Wiswall*, 14 How. Pr. 42; *Hegerich v. Keddie*, 99 N. Y. 258.

GORHAM & WALES, for defendant in error:

The statute invoked by plaintiff in error in the case at bar creates an entirely new cause of action, which is in no sense a survival of a former action. *Chicago v. Major*, 18 Ill. 349; *Holton v. Daly*, 106 id. 131; *Brown v. Railway Co.* 102 Wis. 137; *Leggott v. Railway Co.* 1 Q. B. Div. 599; *Whitman v. Railroad Co.* 23 N. Y. 465; *O'Rielly v. Stage Co.* 34 N. Y. Supp. 358; *Railroad Co. v. Adams*, 116 Fed. Rep. 324.

The terms of the statute under which this action is brought do not extend the action to the administrator or executor of the tortfeasor, and in the event of the tortfeasor's death the common law rule of *actio personalis moritur cum persona* prevails. *Davis v. Nichols*, 54 Ark. 358; *Hegerich v. Keddie*, 99 N. Y. 258; *Norton v. Wiswall*, 14 How. Pr. 42; *Hamilton v. Jones*, 125 Ind. 176; *Russell v. Sunbury*, 37 Ohio St. 372; *Moe v. Smiley*, 125 Pa. 136.

The act of 1872, entitled "An act in regard to the administration of estates," (commonly called the Survival statute,) includes only actions for injuries where the person injured dies from some cause other than the injuries. The statute has no reference to cases embraced within the act of February 12, 1853. *Holton v. Daly*, 106 Ill. 131; *Brown v. Railway Co.* 102 Wis. 137; *Lubrano v. Atlantic Mills*, 19 R. I. 129; *McCarthy v. Railroad Co.* 18 Kan. 46; *Sweetland v. Railroad Co.* 43 L. R. A. 568.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The only question presented for determination is whether this action, brought exclusively for the benefit of the next of kin pursuant to section 2 of chapter 70, Hurd's

Revised Statutes of 1908, can be maintained against the executor of the alleged wrongdoer. At common law an action for a wrong of the character here charged abated upon the death of the person aggrieved or upon the death of the tortfeasor. A change was effected in England by the passage of Lord Campbell's act. (9 and 10 Victoria, chap. 93.) Thereafter, in 1853, our statute requiring compensation for causing death by wrongful act, neglect or default was enacted. The first section of our statute is identical with the first section of Lord Campbell's act, and is in these words:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." (Hurd's Stat. 1908, chap. 70, sec. 1.)

The second section of our statute provides that the action given by the first section shall be brought in the name of the personal representative of the deceased, for the exclusive benefit of the widow and next of kin of the deceased. It will be observed that this act did not affect the common law where the wrongdoer died before judgment, and in that event there could be no further prosecution of any action for the wrong. Nor did the act provide for bringing an action where the death of the party injured resulted from some cause other than that which occasioned the injury. With the law in this condition the legislature, in 1872, enacted section 122 of chapter 3, Hurd's Revised Statutes of 1908, which reads: "In addition to the actions which survive by the common law, the following shall also

survive: Actions of replevin, actions to recover damages for an injury to the person, (except slander and libel,) actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions for fraud or deceit."

This section provides for the survival of any action therein designated if the party aggrieved, or the wrongdoer, or both, should die. (*Northern Trust Co. v. Palmer*, 171 Ill. 383.) Under this section, if the party injured survives and the wrongdoer dies, the party injured may in his lifetime maintain the action, and plaintiff in error herein contends that, this being true, upon the person injured dying as the result of the wrongful act, neglect or default, his legal representative can maintain the action against the legal representative of the deceased under the provisions of section 1, *supra*, for the reason that an action is given by that section against "the person who or company or corporation which would have been liable if death had not ensued." The position of defendant in error is that the two statutes are wholly independent, and that section 122, *supra*, not having been enacted until 1872, the language last quoted from the act of 1853 means the person who at common law "would have been liable." Defendant in error relies principally upon the following cases: *Hegerich v. Keddie*, 99 N. Y. 258, *Norton v. Wiswall*, 14 How. Pr. 42, *Hamilton v. Jones*, 125 Ind. 176, *Moe v. Smiley*, 125 Pa. 136, *Russell v. Sunbury*, 37 Ohio St. 372, and *Davis v. Nichols*, 54 Ark. 358. All these cases arise under statutes which, in substance, are as the first section of Lord Campbell's act, but neither of the first five seems to have been affected by a statute such as section 122, *supra*, and for that reason we do not deem them in point. In Arkansas, however, in addition to a statute substantially in the same terms as the first section of Lord Campbell's act,

there was a statute which provided that for wrongs done to the person or property of another an action might be maintained by the person injured, or his administrator, against the wrongdoer or his administrator. In the Arkansas case the person injured died from his injuries. An action was prosecuted by his administratrix against the wrongdoer. Pending the suit the wrongdoer died, and the question was whether the cause could be revived against his administrator. The court held that whatever cause of action the person injured had in his lifetime against the wrongdoer survived against the administrator of the wrongdoer by virtue of the statute last mentioned, but that the cause of action which may be asserted against the administrator of the wrongdoer by the administrator of one who has received a wrongful injury and died therefrom does not inure to the benefit of the widow and next of kin; that the action which is prosecuted for their benefit is not founded on survivorship but is a new cause of action which the death itself originates, and which begins when the action which could have been asserted by the injured man would end if it was not saved by the survival statute. Placing this construction on the statute of that State, the court in an able opinion reaches the conclusion that the suit, in so far as it was brought for the benefit of the widow and next of kin,—that being the right of action given by Lord Campbell's act,—could not be maintained against the administrator of the wrongdoer, as it was not within the terms of the statute providing for the survival of actions, but that the administrator of the person injured could maintain an action against the administrator of the wrongdoer for the cause of action which was originally in the injured person himself, as that cause of action, by virtue of the statute, did survive to his administratrix.

Contrary to this view we have already held, notwithstanding section 122, *supra*, that after the death of the person injured no action can be maintained for the damages

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which he could have recovered had he not departed this life, and that the only action which his administrator can maintain is the action for the benefit of the widow and next of kin which is given by the statute of 1853. (*Holton v. Daly*, 106 Ill. 131.) While it is held in the Arkansas case that the action which is prosecuted for the benefit of the widow and next of kin is upon a new cause of action which the death itself originates, we have held that the cause of action is the same, viz., the wrongful act, neglect or default, whether the action be brought by the person injured in his lifetime, or by his administrator after his death has been occasioned by the tort, the only difference, according to our view, being that the measure of recovery is not the same. (*Holton v. Daly*, *supra*.) Having held, contrary to the view of the Arkansas court, that the right to recover which was in the person injured does not survive, if we should now hold with that court that the right of action given by section 1, *supra*, could not be asserted against the administrator of the deceased wrongdoer, it is manifest that section 122 would leave the administrator of the person wrongfully injured, who dies from his injuries, without any right to proceed against the administrator of the wrongdoer, precisely as was the situation at common law. No such result is warranted by the opinion in *Davis v. Nichols*, *supra*. We have heretofore held that this statute (sec. 122, *supra*), is remedial in its character and is to be liberally construed. That being true, the construction contended for by defendant in error should not be adopted.

In *Holton v. Daly* it was said that the section in question "was not intended to apply to cases embraced by the act of February 12, 1853," and this statement is regarded by defendant in error as decisive of the present controversy. In that case the court gave no consideration whatever to any question in reference to what actions would survive or might be brought against the legal representative of the wrongdoer. The only thing under consideration

was the right of the administrator of the injured person against the wrongdoer himself. The quoted words were not used with reference to the question now under consideration, and they are therefore without significance in this case. If an injured person dies from some cause other than the injury, the cause of action for damages to the time of his death survives under section 122. *Holton v. Daly, supra; Savage v. Chicago and Joliet Railway Co.* 238 Ill. 392.

The plaintiff in error relies upon the case of *McIntyre v. Sholty*, 121 Ill. 660. In that case a judgment in favor of the administrator of a person wrongfully killed, against the administrator of the person who killed him, was affirmed in this court. The suit was brought under the provisions of the act of 1853. While, as insisted by plaintiff in error, affirmance could only have been had upon the theory that the action given by section 1, *supra*, could be maintained against the administrator of the deceased wrongdoer, still the question whether the action could be so maintained seems neither to have been presented nor considered, and for that reason that case is not controlling. We are of opinion, however, that since the enactment of section 122 of the act of 1872 the legal representative of the deceased wrongdoer is, within the meaning of section 1 of the act of 1853, "the person who * * * would have been liable" if the death of the party injured had not been occasioned by the injuries.

The judgment of the Branch Appellate Court and the judgment of the superior court will be reversed and the cause will be remanded to the latter court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

THE D. M. GOODWILLIE COMPANY, Appellant, vs. THE
COMMONWEALTH ELECTRIC COMPANY *et al.* Appellees.

Opinion filed June 16, 1909—Rehearing denied October 7, 1909.

1. EASEMENTS—*easements may be created by covenants or by agreements.* Easements may be created by covenants or agreements as well as by grant, and in construing such instruments the court may look to the circumstances attending the transaction, to the situation of the parties, the state of the thing granted and the object to be attained, in order to ascertain and give effect to the intention of the parties.

2. SAME—*in case of ambiguity the practical construction by the parties may be resorted to.* In case of an ambiguity in the meaning of a contract creating an easement the practical construction placed thereon by the acts of the parties may be resorted to to determine the meaning of the grant.

3. SAME—*when signing petition to vacate street is an abandonment of party's rights.* A lot owner who signs a petition for the vacation of a street shows his intention that the property may be used for private purposes, and, in effect, abandons any possible easement he may have in the use of a switch track in the vacated portion of such street, and his acts in relation thereto are binding upon his successors in title.

4. SAME—*when property owners consenting to the vacation of a street are estopped to demand restoration of original conditions.* Where property owners in a block consent to the vacation of a portion of a street and extensive improvements are erected upon the vacated portion in reliance upon such vacation, such property owners and their successors in title are estopped to demand that the original conditions be restored.

5. SAME—*when easement is appurtenant.* Where the dominant and servient estates are clearly defined in an easement contract and the easement is beneficial to the dominant estate the easement is appurtenant and not in gross, and it is not necessary that the dominant and servient estates be contiguous or that the right of way granted shall terminate on the dominant estate.

6. SAME—*easement created by a grantor in favor of lands retained is appurtenant.* An easement created by a grantor in lands of his grantee in favor of lands retained by the grantor and beneficial thereto is appurtenant to the lands retained and is binding upon subsequent purchasers of the grantee's land.

7. SAME—*the word "heirs" need not be used to make easement a perpetual one.* An agreement between grantor and grantee that

the grantee will construct a switch track which "may be forever after used" by the owners of other lots fronting on certain streets, creates a perpetual easement in the use of such track, although it does not use the word "heirs" or any other words which would convey a fee at common law.

8. *SAME—equity may enforce an easement contract in favor of person not a party to the agreement.* A court of equity may enforce an agreement creating an easement in favor of a person not a party to the easement contract, where the contract was made for his benefit and was based upon valuable consideration.

9. *SAME—when an easement in favor of lots includes territory embraced in vacated street.* Where a plat is not a statutory one and a street shown thereon has not been accepted by the public, a purchaser of an abutting lot takes title to the center of the street, and an easement created in favor of the lot while such condition exists attaches to the portion of the street belonging to the lot; and while subsequent public acceptance of the street charges the public easement upon the title of the property owner, yet when the street is thereafter regularly vacated the property owner is restored to a full enjoyment of his rights.

10. *SAME—when lots have no rights under easement contract.* Although a contract creating an easement in the use of a switch track may have been intended for the benefit of all the lots in a certain subdivision, no rights can be claimed in favor of the lots whose owners failed to contribute to the cost of constructing and maintaining the track.

11. *SAME—when use of a switch track easement is excessive.* Where the owner of lots having an easement in the use of a switch track constructs an electric plant so that it is partly upon such dominant lots and partly upon non-dominant lots, the switch track can be used only for the benefit of the dominant lots; and if the boilers are located on dominant land, but the turbines, to which the steam is piped and which operate the dynamos for generating electric current, are partly upon non-dominant land, the use of the switch track to convey coal for the boilers and ashes and cinders from the boilers is excessive.

12. *PLATS—plat cannot be partly statutory and partly common law.* A plat is an entirety, and if a part of the owners whose lands are included in the plat fail to comply with the statute requiring acknowledgment of the plat in person, the effect of the entire plat as a statutory dedication is destroyed, even though the owners of the other lands embraced in the plat complied with the statute.

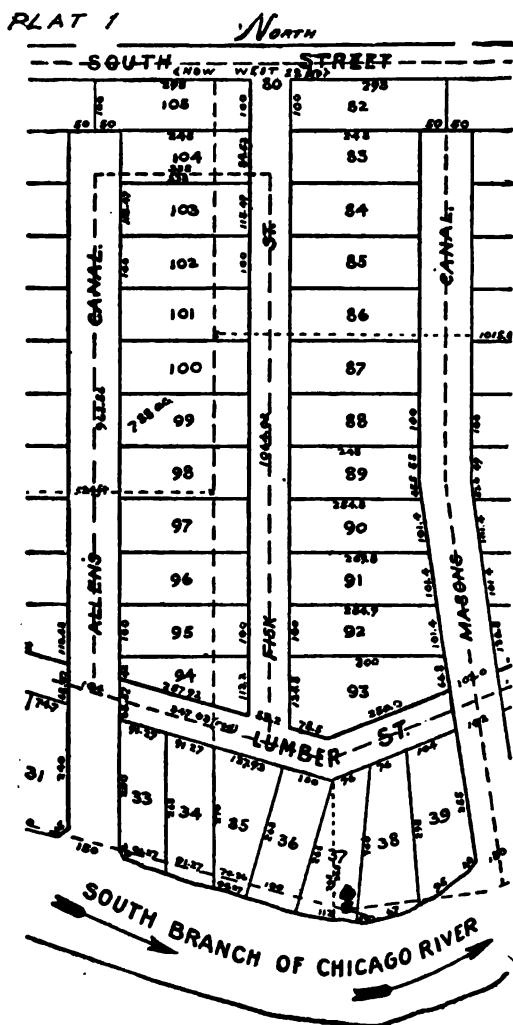
APPEAL from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

This was a petition filed by the appellant September 21, 1903, under the Burnt Records act, (Hurd's Stat. 1908, chap. 116, p. 1728,) to establish its title in fee simple to lot 82 (except the north twenty-five feet thereof) and lots 83 to 86, inclusive, in Greene's South Branch addition to Chicago, Cook county, Illinois, and to enjoin certain of appellees from using a switch track on said lots, the public records relating to which title were destroyed by the great fire in Chicago, October 8 and 9, 1871. The petition was thereafter amended, and after the issues were finally joined on the pleadings the matter was referred to a special master in chancery, and on the report of his findings being made to the trial court a decree was entered therein, from which an appeal has been prosecuted to this court.

No question is raised as to the sufficiency of the pleadings, and as they are quite voluminous no attempt will be made to set them out. The conclusions of the master and the findings of the decree will be better understood after the principal facts in the record are stated.

In 1856 the owners of a tract of land (in which are included the lots now in question) subdivided it under the title "Greene's South Branch addition to Chicago," and caused a plat to be filed for record in the recorder's office of Cook county June 17, 1856. The plat was executed and acknowledged by certain of the owners by their attorneys in fact, and by other of the owners in person, before a justice of the peace in Cook county. William Greene and John F. Hance, who acknowledged the plat in person, were then owners, as equal tenants in common, in fee simple, of 35.64 acres in the central part of the land covered by the plat, and some of the other parties who joined in the plat owned the west 20.24 acres and others the east part of the tract. The exact location of the lines dividing the Greene and Hance portion of the platted land from the other portions thereof is not clearly shown by the evidence, but it is alleged in the petition, admitted by the answers and found by the master's report and decree, that the land owned by

Greene and Hance at the time the plat was made and recorded included said lots 82 to 86, and it seems reasonably certain from the record that the portion owned by Greene and Hance also took in lots 87 to 93, inclusive, and the land south of the last named lot to the river. The portion of said plat of Greene's addition which appears necessary for an understanding of the issues involved is herewith given:



Of the land shown on the foregoing plat, lots 82 to 97, inclusive, and 33 to 39, inclusive, together with strips of land shown on the plat as Fisk street and Lumber street, between Allen's and Mason's canals, are involved in this controversy. At the time of the subdivision this property was a rough slough, with mudholes throughout, and the owners, shortly after making said plat, proceeded to dig the canals as shown, which were afterwards made navigable for heavily laden vessels. The first occupants of the land were Walker & Cutting, who established a brickyard there and filled up a large part of the slough. In 1859 the owners of the property in question, (with the exception of Caleb Allen, who owned lots 94 to 103, inclusive, and probably other property,) in order to pool their interests, facilitate the handling of the property and acquire railroad and water communications, proceeded to organize the Chicago South Branch Dock Company under a special act of the General Assembly. This charter authorized the corporation to improve the lands therein described, (including the property in question,) build canals, construct railroads and otherwise manage and improve the territory. Its capital was \$650,000 and its duration limited to thirty years. Upon its incorporation the several owners of the lots here in question, with the exception of Caleb Allen, conveyed to it their respective holdings and took stock in the corporation in exchange therefor.

February 28, 1865, the dock company, by deed, conveyed in fee to John S. Reed, Asa E. Cutler, John H. and George Witbeck, as tenants in common, the south half of lot 82 and lots 83, 84, 85 and 86 in Greene's addition, and at the same time and as a part of the same transaction, and as a part of the consideration therefor, a contract, hereinafter set out, was signed by the parties to the deed. On February 27, 1867, the dock company conveyed in fee, by warranty deed, to John S. Reed, Asa E. Cutler, John H. and Henry Witbeck, the south twenty-five feet of the north

fifty feet of lot 82. Reed, Cutler, John H. and George Witbeck thereafter conveyed all their interests in said lots 82 to 86, inclusive, to Henry Witbeck. The latter died testate April 12, 1891, while a resident of Cook county, Illinois, where his will was probated, devising to his son, John H. Witbeck, in fee simple, said lots 82 to 86, inclusive. The title to said lots 82 to 86, inclusive, remained in said John H. Witbeck until July 5, 1903, when, by warranty deed, on that date he conveyed them to appellant, subject to the railroad rights in the north twenty-five feet of said lot 82.

These lots, as we have stated, were first occupied by Walker & Cutting as a brickyard, early in 1866. The brickyard was thereafter removed and the lots taken possession of by Reed, Cutler, John H. and George Witbeck, who composed the firm of Cutler, Witbeck & Co., and occupied them until about 1868 as a lumber yard. In the latter year the Henry Witbeck Company succeeded to the business of Cutler, Witbeck & Co., and continued in the lumber business on the premises until May, 1894. In the last named year John H. Witbeck, the then owner, leased the lots to Arthur Gurley & Co., lumber dealers, who occupied them until October, 1901, when they sub-let them to Deacon & Co., lumber dealers, for a term expiring April 30, 1904, and Deacon & Co. continued in possession to that time. Upon the conveyance of said lots by John H. Witbeck to appellant, in 1903, Deacon & Co. attorned to that company until they surrendered possession of the lease of their lots, and the lots have since been in the possession of appellant.

By deed dated October 1, 1865, the dock company, then being the owner of lots 87, 88 and 89 and the north half of lot 90, conveyed the same to Jacob and Henry Beidler. September 21, 1865, the company deeded the south half of lot 90, all of lot 93 and the south half of lot 92 to Jacob and Henry Beidler. September 23, 1865, William Greene, then owner of the north half of lot 92, conveyed the same in fee to Jacob and Henry Beidler. By sundry conveyances

through William Greene, John F. Hance and Jasper Fisk, lot 91 was conveyed on September 21, 1865, to Jacob and Henry Beidler. Thereafter, by conveyances and inheritance, Augustus F. Beidler, son of Jacob Beidler, became the owner in fee of said lots 87 to 93, inclusive, and by deed dated October 25, 1901, conveyed the same in fee to Louis A. Seeberger, who by deed of the same date conveyed said lots to the Commonwealth Electric Company. All of said lots 87 to 93, inclusive, were occupied for the lumber business by various firms from 1865 until the property passed into the possession of the Commonwealth Electric Company, in 1902. The occupancies of the various firms need not be set out in detail.

By sundry conveyances from William Greene, John F. Hance and Henry G. Miller, Jacob Beidler and Henry Beidler obtained title to said lots 36 to 39, inclusive, January 5, 1866, and these lots afterwards became the property of Augustus F. Beidler, and by him were conveyed, through Seeberger, to the Commonwealth Electric Company, October 25, 1901. These lots were occupied by various firms engaged in the lumber business from 1866 to 1902, when they came into the possession of the Commonwealth Electric Company. By sundry conveyances through William Greene, Richard J. Arnold and Amos Greene, lots 33, 34 and 35 were conveyed to Jacob Beidler by deed dated August 15, 1881, and thereafter by Augustus F. Beidler, through Seeberger, to the Commonwealth Electric Company October 25, 1901. These lots also were occupied by various firms in the lumber business from 1867 or 1868 down to 1901, when they were acquired by the Commonwealth Electric Company.

At the time Greene's subdivision was made, in 1856, Caleb Allen appears to have been the owner of lots 94 to 103 and 104 and 105. Some time in 1856, the exact date not being clearly shown in the record, Allen conveyed these last two lots to the South Branch Dock Company, which

corporation in 1868 re-conveyed them to Allen. By deed dated June 9, 1902, James Nowell, trustee under the will of Caleb Allen, conveyed lots 94 to 97 to Louis A. Seeberger, and the latter, by deed dated June 9, 1902, conveyed the same to the Commonwealth Electric Company. January 30, 1904, James Nowell, as such trustee, conveyed lots 98 to 105, inclusive, to Louis A. Seeberger, and the latter on the same date conveyed them to the Commonwealth Electric Company. Most, if not all, of these last named lots were occupied by the various corporations in the lumber business from 1868 until they were taken possession of by the Commonwealth Electric Company.

In 1868 all of the land south of Twenty-second street, in the vicinity of the land in question, was used for lumber yards, and it is now known as the lumber district. Throughout this district switch tracks run from the main railroad lines through side streets, and curved switches, similar to the one involved in this case, are provided for in deeds of property in the district similarly situated with reference to the railroad. March 15, 1864, an agreement in writing was entered into between the Chicago South Branch Dock Company and the Chicago, Burlington and Quincy Railroad Company by which the dock company conveyed to the railroad company certain lands, and the right to use perpetually the strip of land twenty-five feet in width from the north side of Greene's South Branch addition to Chicago, within the lands of the dock company, for railroad purposes. The railroad company, on its part, agreed to put in and maintain at suitable points on said tract so conveyed, switches and frogs, to connect with each railroad track which might thereafter be put down in each of the streets running north and south through said South Branch addition, and agreed that it would permit the dock company, or other owners of property in said addition, to connect with said railroad, subject to the condition that all tracks to be put down in said streets should be constructed and main-

tained at the expense of the dock company or the persons constructing the same. About 1866 the Burlington Railroad Company began the construction of a track along the north twenty-five feet of the lands in Greene's South Branch addition. A track was likewise built running east and west on Twenty-second street. February 28, 1865, the contract heretofore referred to was entered into between the Chicago South Branch Dock Company of the first part, and John S. Reed, Asa E. Cutler, John H. Witbeck and George Witbeck of the second part. This agreement reads as follows:

"Agreement made this twenty-eighth day of February, A. D. 1865, between the Chicago South Branch Dock Company, party of the first part, and John S. Reed, Asa E. Cutler, John H. Witbeck and George Witbeck, party of the second part:

"Witnesseth: Whereas the party of the first part has this day sold and conveyed to the party of the second part the following described lots, pieces and parcels of land situate in the city of Chicago, county of Cook and State of Illinois, to-wit: The south half of lot 82 and the whole of lots 83, 84, 85 and 86 in Greene's South Branch addition to Chicago:

"Now, therefore, in consideration thereof and of the agreement hereinafter made by the said party of the first part, the said party of the second part do covenant and agree to and with the party of the first part that they will, within sixty days after they shall take possession of the lots so conveyed to them, as aforesaid, build a railroad track from the track now laid down by the Chicago, Burlington and Quincy Railroad Company immediately south of the south line of Twenty-second street, on a curve not greater than six hundred feet radius, to the center of Fisk street, in Greene's South Branch addition, and thence down the center of Fisk street as far as the south line of lot 86 extended to the center of Fisk street, so as that the same may be extended south of Fisk street, and that said track, when so built, may be forever after used, in common with the said party of the second part, by any and all of the owners of other lots fronting on Lumber street, between Mason's canal and Allen's canal, and of lots fronting on Fisk street, in said addition: *Provided, however,* that the owner of each lot using said railroad track shall, before he shall be entitled to use the same, pay to said party of the second part such proportion of the cost of constructing said railroad track from the Chicago, Burlington and Quincy railroad to the north line of the south fifty feet of lot 82 as the width of such lot shall bear to the combined width of

all the lots using said railroad, and shall thereafter pay the same proportion of the expense of keeping in repair said railroad track from the Chicago, Burlington and Quincy railroad as far as the same may be extended; and the said party of the first part on its part doth covenant and agree that the said party of the second part may, upon the faithful performance and observance by them of their agreement as herein contained, lay a second railroad track for the accommodation of said lots so conveyed to them, as aforesaid, over the south twenty-five feet of the north fifty feet of lot 82, and that they may use and operate said railroad track upon and over said south twenty-five feet so long as they shall well and faithfully observe the stipulations herein contained and on their part to be performed.

"In testimony whereof the said party of the first part has signed these presents by its president and affixed its seal hereto, and said party of the second part have signed these presents and affixed their seals hereto, the day and year first above written.

CHICAGO SOUTH BRANCH DOCK Co.,

By R. E. Mason, *President*.

[Corporate
Seal.]

JOHN S. REED, (Seal)

ASA E. CUTLER, (Seal)

JOHN H. WITBECK, (Seal)

GEORGE WITBECK. (Seal).

"It is understood that Cutler, Witbeck & Co. are not bound to allow parties owning lots 101, 102, 103 to use the track which they construct from the C., B. and Q. R. R. track south of South street to the south line of lot No. 86 unless they pay their proportion of the cost of the same.

R. B. MASON, *Pres. C. S. B. D. Co.*

[Corporate Seal.]

Attest: A. J. KNISELY, *Sec.*

This instrument was duly acknowledged and recorded. The records showing this agreement having been destroyed by the great fire in 1871, the parties in 1874 restored it and re-filed the copy, with the following statement and agreement signed by the officers of the Chicago South Branch Dock Company and the then owners of lots 82 to 86, inclusive. This agreement, filed as a part of the original agreement, reads as follows:

"Whereas, Henry Witbeck has become seized of the premises above described as having been sold and conveyed by the Chicago South Branch Dock Company to John S. Reed, Asa E. Cutler, John H. Witbeck and George Witbeck, the said Henry Witbeck having by conveyances of the same succeeded to the estate of said

grantees, who were known as Cutler, Witbeck & Co.; and whereas, the original of the foregoing articles of agreement, dated February 28, 1865, and of the supplemental provision aforesaid thereto added, was destroyed in the Chicago fire of October 8 and 9, 1871:

"Now, it is understood and agreed between the said Chicago South Branch Dock Company of one part and said Henry Witbeck of the other part, that the foregoing is a substantial copy of the original papers and is to be taken and treated accordingly, and to be binding on the parties and their legal representatives in like manner as the original of each of said papers was binding.

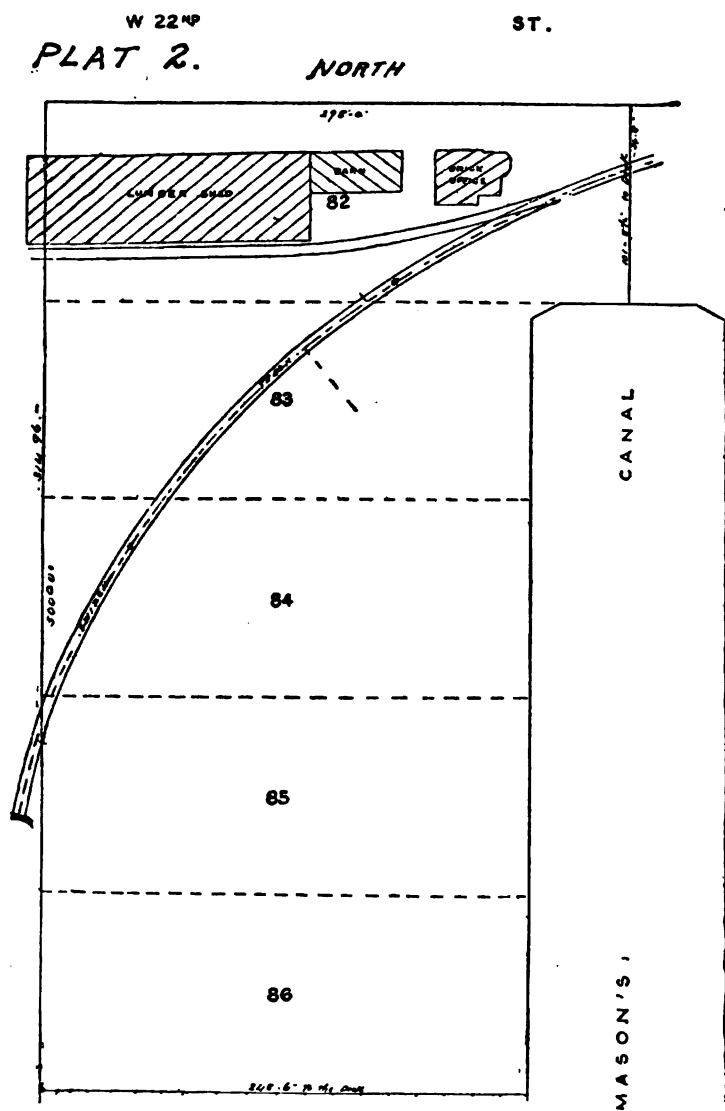
"In witness whereof the Chicago South Branch Dock Company causes this writing to be signed by its president and secretary and the corporate seal of the company to be hereto affixed, and this writing is signed and sealed by said Henry Witbeck.

CHICAGO SOUTH BRANCH DOCK Co.,
By R. B. Mason, *Pres.*, and E. G. Mason, *Sec.*,
[Corporate Seal.] H. WITBECK,
J. H. WITBECK.

Attest: E. G. MASON, *Secretary.*"

This supplemental agreement, attached to the original, was acknowledged by the officers of the company and by H. Witbeck and John H. Witbeck, then owners of said lots.

In 1866, under the privileges conferred by the contract between the dock company and the railroad company above referred to and in accordance with its terms, a railroad switch track was constructed, beginning at the Burlington track on the north twenty-five feet of Greene's South Branch addition, just east of lot 82, and running in a curve south-westerly across lots 82, 83 and 84 and the north-west corner of lot 85, to Fisk street. The approximate location of the track is shown by the following plat:



The curved track, as shown on this plat, has remained in its original position up to this time. The proof is not clear as to how far south in Fisk street this track was built

at that time, but it may be assumed from this record that it was extended in accordance with the terms of the agreement by the then owners of lots 82 to 86, as far south, at or near the center of Fisk street, as the south line of said lot 86. At any rate, the record shows that within a year after the construction of the curved track it was extended directly south, approximately along the center line of Fisk street, across Lumber street, to about sixty feet north of the river. Another extension branched from the east side of the main track last noted in Fisk street about opposite lot 86 and ran south in Fisk street to about opposite lot 89. From the westerly or main track in Fisk street, near lot 93, two branches ran off to the south-east for the use of occupants of that part of the land in question, and a third spur track ran from said main extension south-east to lot 36. These extensions remained until the South Branch Lumber Company came into possession of them, and then the two switch tracks which branched from the main track near lot 93 were discontinued, and later there was constructed a track from the main switch between lots 88 and 90, which ran south parallel with the main track to a point approximately sixty feet north of the river. This situation continued until 1898, when the Lord & Bushnell Company located on some of the ground now owned by the Commonwealth Electric Company. The Lord & Bushnell Company made some slight changes in the tracks at the southerly end, but preserved the same general situation until the Commonwealth Electric Company came into the possession of its lots as above set forth in 1902, and made certain changes in these tracks and built others. The tracks as changed and constructed, together with the buildings erected by the said Commonwealth Electric Company, are shown with approximate accuracy by the following plat:

south-easterly across lot 105, and thence curved toward the south and ran west of and parallel with Fisk street to a point not far from the river. The track was used by the occupants of lots west of Fisk street, and continued in operation for the benefit of lots west of Fisk street and south of lot 98 until the Commonwealth Company came into possession of the property here in question. This track is now owned and controlled by the Commonwealth Company.

Prior to the removal of the brickyards of Walker & Cutting the land within the lines of Fisk and Lumber streets was used as a part of the adjoining property, with no indication of the street lines. After the establishment of lumber yards in this district Fisk street to Lumber street was left open in part, but the adjoining occupants, to a greater or less extent, piled lumber in the street, leaving only room enough for teams to haul lumber back and forth. The street, however, was not graded or thrown up. The use of Fisk street for teaming purposes continued until the Commonwealth Electric Company took possession of its lots, in 1902. The use of Fisk street for piling lumber ceased in 1875, when the city authorities forbade the practice of obstructing the street. Lumber street was never thrown up or used as a street, and until the Commonwealth Company came, in 1902, was used by the adjoining occupants for piling lumber. In May, 1902, the city of Chicago, by ordinance, vacated the part of Lumber street between Mason's canal and Allen's canal and the part of Fisk street between Lumber street and the north line of lot 97 extended. Such vacations were made upon petitions signed by adjacent property owners, one of which was signed by John H. Witbeck, who was then the owner of lots 82 to 86, inclusive.

In 1902 the Commonwealth Electric Company constructed a fence, beginning on the north line of lot 97 at its intersection with Allen's canal, thence running east to the east line of Fisk street, thence north three hundred feet to the north line of lot 87, and thence east to Mason's canal.

It was a tight board fence, five feet or more in height. Within the lines of what was formerly Fisk street there were two gates, fastened with movable braces, providing openings for the two westerly railroad tracks on Fisk street. In constructing said fence said Commonwealth Company left an opening in the portion of the fence running north and south, near the north line of lot 87, for the switch track. The fence is now substantially in the condition described, with a barbed wire running along its top. The gate for the center track is kept closed, except when railroad cars or employees pass through.

At the present time lot 82, except the north twenty-five feet thereof, and lots 83 to 86, are occupied by petitioner, which conducts thereon its business of box manufacturing, and the present improvements consist of a brick office building toward the east end of lot 82, and a frame shed north of the switches on lot 82 but projecting slightly into Fisk street. The location is shown on plat 3, heretofore given.

The Commonwealth Electric Company occupies lots 33 to 39, inclusive, and lots 87 to 97, inclusive, and that part of Lumber street between Mason's and Allen's canals, and that part of Fisk street between Lumber street and the north line of lot 97 extended. The Commonwealth Electric Company is engaged in the business of manufacturing and selling electric current. The buildings placed on said lands by the said company and now occupied by it are as follows: The main building, which is of brick, two hundred and forty feet in its east to west measurement and two hundred and thirty feet from north to south. Its west line is nearly coincident with the west line of Fisk street vacated, and the building extends thence easterly, occupying a considerable portion of lots 92 and 91 and a small part of lot 90. Its location is shown on plat 3. Switch tracks enter the building as set forth thereon. Its north line is sixty-six feet south of the north line of lot 97 extended. The construction of the building was begun in June, 1902, and completed

before May 1, 1904. The building contains machinery for generating electricity. It is about eighty feet in height, with large smoke-stacks. The machinery is massive, and a considerable portion of it is located within the lines of Fisk street. Other improvements on the property of the Commonwealth Company consist of a small gate-keeper's office, (a frame structure, one story high,) at the north-west corner of lot 88; a substantial brick building, approximately one hundred and fifty feet in length, occupying the eastern portion of lots 95 and 96; a long frame shed occupying a portion of lot 36 and Lumber street vacated, and a small frame structure on the north-west corner of lot 93,—all of which are shown on plat 3 above.

The exact character and position of the machinery is set forth in a stipulation filed by the parties to this litigation, substantially as follows: The actual manufacturing of electricity is carried on entirely within the large brick building. There is a brick wall extending north and south from the north to the south end of this building to its full height, the east face of which is six feet west of the east line of the vacated portion of Fisk street. The portions of this building east and west of the east face of the brick wall constitute one entire building and together constitute a part of the plant of the Commonwealth Electric Company, which is devoted exclusively to the business of manufacturing and distributing electricity. This plant consists of steam boilers for making steam used in the generation of electrical current, and steam turbines and generators for generating electricity by the use of the steam made in the boilers, and of other necessary equipment. All the steam boilers in this plant are located in that part of this building which is east of said brick wall, and the west end of each of these boilers is located 8.94 feet east of the west face of the brick wall. There are in that part of the building west of the brick wall ten steam turbines and electrical generators, arranged in a line from the north to the south end of that

part of the building which is west of the brick wall, (which room is called the turbine room,) each of which turbines and generators is fixed upon a vertical shaft and constitutes a body of machinery which is of a cylindrical shape, about twenty-five feet high and sixteen feet in diameter at the base and narrowing to about twelve feet in diameter at the top. These turbines and generators are so located that the east half of each one of them is upon the east side and the west half on the west side of a line drawn through the center of Fisk street vacated. Running from the part of the building which is east of the brick wall are ten metal pipes, fourteen inches inside diameter, which run from the steam boilers through the brick wall into that part of the building west of the wall and there connect with the steam turbines, each of the pipes connecting the boiler to which it is attached with the corresponding turbine, said pipes being used for the purpose of conveying steam from the boilers to the turbines, for the purpose of operating the turbines in the making of electricity in said plant. The portion of the building west of the wall is all one room, and along the east side of it, about fifteen feet from the ground floor, is a balcony five feet in width, extending along the entire east side of the turbine room, and opening upon this balcony are six doors in the brick wall at substantially equal intervals from the north to the south, which doors lead onto the floor of the second story of that part of the large brick building which is east of the wall, and immediately below said six doors are six large double doors, which lead from the ground floor on the turbine room into that part of the building east of the brick wall, or the boiler room.

The Commonwealth Company has used, and is using, the curved track across lots 82 to 85 in connection with the switch track constructed by it in 1902, branching from the curved track in Fisk street towards the east, opposite lot 85, and thence, with its branches, entering lots 87 to 90, as shown on plat 3, almost exclusively for the purpose of car-

rying coal onto the lots owned by it lying east of Fisk street, into the part of the building east of the brick wall and wherein its boilers are located, to be used, and actually used by it, for producing steam in said boilers and for the purpose of carrying away the cinders and ashes remaining after the combustion of the coal. The company, in operating its plant, uses large quantities of coal in the furnaces under these steam boilers. The steam made in the steam boilers from said coal is conducted from the boilers through said metal pipes to the steam turbines in the turbine room and there used in the turbines for the manufacture of electricity. These conditions, with reference to the arrangement and operation of the plant, existed at the filing of the original petition, with the exception that at that time there were only four steam turbines and electric generators, with their connecting boilers, in the plant, while now there are ten turbines and generators, with their connecting boilers, therein.

All the switching done over the curved track has been done by the Burlington railroad, with its locomotives. The east and west switch track has been used exclusively by the owners of lots 82 to 86, and the owners and occupants of said lots have never used the tracks south of the south line of lot 86, except that during the occupancy by the Henry Witbeck Company of lots south of lot 86 that company used a portion of the tracks opposite the lots it occupied, and very rarely at other periods lines of cars standing for the most part opposite lots 82 to 86 were pushed slightly south of the latter lot. From the first use of the property in question to approximately the year 1885 the curved track was used by the occupants of the several lumber yards for shipping their lumber out over the curved track to the Burlington road. During that period, and continuously since that time, substantially all receipts of lumber by all of the occupants of yards on the property in question were by water, and cars coming in by the curved track were sent in empty,

to be filled at the yards. During the period from 1868 to approximately 1885 the switching of these cars over the curved track was done partly in the day and partly at night, but after the year 1885 a change in the service was made, and from that time to the purchase of the property by the Commonwealth Company switching over the curved track was only during the night time, (except on Sundays, when it was done in the daytime,) and on rare occasions at other times during the day, seemingly by the special request of the occupants of the yards south of lot 85, and then by the consent of the owners of lots 82 to 86. At all times the cars were placed in numbers and at places to suit the convenience of the occupants of the different yards, and the curved track apparently was used by the various occupants of these yards for the cars to stand on while they were being loaded and unloaded with lumber.

The use of the curved track by the Commonwealth Electric Company has been substantially as follows: During the time of the construction of its buildings the materials were delivered by cars over it. This use occurred during the day as well as during the night, and continued for the period of a year. The machinery for the buildings was likewise delivered in the same way. No proof of objections on the part of the owners or occupants of lots 82 to 86 was made. During the last named period Deacon & Co. were in possession of lots 82 to 86, and upon one occasion a request was made of the Commonwealth Electric Company by that firm that the cars running to and from the Commonwealth plant or standing upon the tracks be so handled or placed as to enable them to load their cars without interruption. After the occupancy of the appellant company a request was made by that company of the Burlington road to place the Goodwillie cars upon the track south of their occupation, so that when the Commonwealth Company switched its cars through, the Goodwillie cars would not have to be removed entirely from the track in question. This request

was not granted. Deacon & Co. used the curved track within lots 82 to 85 during the daytime to load and unload lumber. After the completion of its buildings, as heretofore set out, the Commonwealth Company used, and is using, as shown by the stipulation between the parties heretofore set out, the curved track.

The special master made an exhaustive report to the superior court, setting forth the facts as stated above and his conclusions of law thereon, and the court, after a hearing, entered a decree finding, among other things, that the deeds, conveyances and other instruments in writing in the chain of title of said D. M. Goodwillie Company to said lot 82 (except the north twenty-five feet thereof) and said lots 83 to 86, in Greene's South Branch addition to Chicago, and said records in the recorder's office of Cook county of said deeds, conveyances and other instruments of writing which were recorded, as theretofore set out in the decree, were destroyed by fire, as therein stated, and that they be established and restored, and that title in fee simple of said petitioner in and to the said premises be and is established and confirmed, subject only to the easements hereinafter expressly decreed to be and exist thereon, or any portions thereof; that the copy of said easement agreement between said dock company and said Reed, Cutler and the Witbecks, dated February 28, 1865, and recorded in the office of the recorder of deeds of Cook county, as hereinabove set out, is a true copy of the original agreement which was recorded in the recorder's office on December 30, 1865, and that the terms and provisions of said agreement, as the same are above set forth, are binding upon the parties to this cause and upon all parties claiming through or under them; that the defendant the Commonwealth Electric Company, its successors and assigns, as owners of lots 33 to 39 and 87 to 93, inclusive, including the half of vacated Fisk street and of vacated Lumber street lying adjacent to said lots, all in Greene's South Branch addition to Chicago, have

the right to use, in perpetuity, the said curved switch track extending from the railroad track of the Chicago, Burlington and Quincy Railroad Company on the north twenty-five feet of Greene's South Branch addition and down the center of Fisk street to the south line of lot 86 extended, as said curved switch track is now located and laid out, as shown on said plats, in common with said Goodwillie Company, as the owner of said lots 82 to 86, inclusive, its successors and assigns, in accordance with the terms and conditions of said easement agreement; that the petitioner and said Commonwealth Company, and their respective successors and assigns, have the right to use said switch track in common, for the purpose of transferring railroad cars thereon, at all times, back and forth between said track of the Burlington Railroad Company on the north twenty-five feet of Greene's South Branch addition and said lots in this clause described, owned by the said Goodwillie Company and said Commonwealth Company, respectively, for the use and benefit of said lots, respectively; that said Goodwillie Company, subject only to the easement herein decreed in favor of said Commonwealth Company, has the right to use the ground covered by said curved switch track and said track upon its premises for all lawful purposes not inconsistent with the rights of said Commonwealth Company, its successors and assigns, as herein set forth; that the right of the Commonwealth Company, its successors and assigns, to use said curved switch track, as aforesaid, constitutes a perpetual easement in said lots 82, (except the north twenty-five feet thereof,) 83, 84 and 85 in Greene's South Branch addition, appurtenant to said lots 33 to 39 and lots 87 to 93, inclusive, in Greene's South Branch addition, including the half of vacated Fisk street and vacated Lumber street lying adjacent to said lots; that said easement is not appurtenant to any of lots 94 to 97 in Greene's South Branch addition, or to the half of vacated Fisk street or of vacated Lumber street lying adjacent to said lots 94 to 97, or any of them,

and is not appurtenant to lots 98 to 105, or to any part thereof; that the use of the said curved switch track by the Commonwealth Company in connection with the switch track constructed by it in 1902, branching toward the east, opposite lot 85, for the purpose of hauling coal, cinders and ashes thereover, as hereinbefore set forth, is within the rights of said company, and that said company, its successors and assigns, have the right to continue such use of said curved switch track; that by said easement agreement of February 28, 1865, neither said Reed, Cutler, John H. Witbeck nor George Witbeck, nor any of them, nor any persons holding said lots 82 to 86 in Greene's South Branch addition under them, acquired any right to the use of any part of the extension of said curved switch track in Fisk street south of the south line of said lot 86 extended, and that said Commonwealth Company, by the construction and maintenance of the fence across Fisk street, has not excluded the petitioner from the exercise of any rights acquired by petitioner under said agreement; that the Commonwealth Company, its successors and assigns, as owners of the lands to which the easement in said curved switch track is appurtenant, have the right forever to maintain said curved switch track in its present location, as hereinbefore described, and that the cost of maintaining the same shall be borne by the parties using the same in accordance with the provisions of the agreement dated February 28, 1865; that the Commonwealth Company, its successors and assigns, are not entitled to maintain the existing connection between said curved switch track and the track constructed by said company in 1902, and branching towards the west from the track in Fisk street opposite the dividing line between said lots 88 and 89, entering said lot 97 and thence running south parallel with Fisk street (vacated) into lot 35, (this switch track is shown on said plat 3,) or to connect with the said curved switch track any track onto lots 94 to 97, aforesaid, or any of them.

The findings of the decree followed the recommendations of the master, except in one respect. The master reported that the cost of construction of the curved switch track was paid in the first instance by John S. Reed, Asa E. Cutler, John H. and George Witbeck, or the firm of Cutler, Witbeck & Co., representing the same interests, and that subsequent to such payment, to-wit, on August 19, 1865, they sent a bill to Jacob and Henry Beidler, under the name of Beidler & Bro., for \$300.15, being eleven-fifteenths of the cost for 237 feet of said switch track, and that said bill was paid by Beidler & Bro. and that the cost of the remainder of the track was borne in like proportion; that the first cost of extension of the switch track south of Fisk street, including the first branches leading therefrom, as above set forth, was paid by Jacob and Henry Beidler, owners of the property lying south of the south line of lot 86; that the cost of maintaining the tracks on Fisk street south of the south line of lot 86, and of altering, repairing and maintaining all the branches south of said line, has always been paid by the owners of the property lying south of said line; that the cost of maintaining the curved switch track from Twenty-second street to the south line of lot 86 was paid at first in the above proportion of four-fifteenths thereof by the owners of lots 82, except the north twenty-five feet thereof, and of lots 83 to 86, inclusive, and eleven-fifteenths thereof by the owners of property south of lot 86; that an expenditure of \$66 for the repair of said switch track in the latter part of 1867 was paid in the above proportion; that subsequently the proportions were changed according to the relation of the numbers of lots south of lot 86 using the curved switch track, to the five lots 82 to 86; that in 1898 bills aggregating a considerable sum were paid by the owners in the proportion of four-nineteenths by the owners of lots 83 to 86 and fifteen-nineteenths by the owners of lots south of lot 86; that in 1903 certain repairs were made to the curved track at a cost of \$218.08, which amount was

paid by the Commonwealth Company, without contribution from the owners of lots 82 to 86; that the cost of maintenance of the switch track running east and west on lot 82, terminating at Fisk street, has always been paid in full by the owners of lots 82 to 86.

Appellant filed an objection to a part of the above statement, claiming that the evidence showed that the original cost of construction of the curved track south of the north line of the south half of lot 82 to a point in the center of Fisk street, as far as the south line of lot 86 extended to the center of Fisk street, was borne solely by John S. Reed, Asa E. Cutler, John H. and George Witbeck, and that no part of the original cost of construction of this part of said switch track was borne by Jacob Beidler or Henry Beidler, or either of them. This objection was sustained by the court. In all other respects the conclusions of the master and the findings of the decree substantially coincide.

The Chicago Title and Trust Company, as executor of the will of John H. Witbeck, deceased, has filed a brief herein, in which the same position is taken on all legal questions raised as that taken by the appellant company.

JAMES E. MUNROE, and MARTIN M. GRIDLEY, for appellant:

Agreements imposing burdens on one estate for the benefit of another are to be strictly construed against the grantee, so that nothing will pass except what is clearly granted. *Railway Co. v. Railway Co.* 58 Minn. 128; *Eckhart v. Irons*, 128 Ill. 568; *Hutchinson v. Ulrich*, 145 id. 337; *Ewertsen v. Gerstenberg*, 186 id. 344; *Hays v. St. Paul Church*, 196 id. 633; *Downen v. Rayburn*, 214 id. 342.

The rule that restrictions on the use of property held in fee are not favored, and that in construing such restrictions all doubts are resolved in favor of the free use of property for all lawful purposes in the hands of the owner of the fee,—in favor of natural rights and against restric-

tions thereon,—applies equally whether the restrictions are in the nature of reservations to the grantor or are direct grants to the grantee, or are purely easement or restrictive agreements not contained in or accompanying a conveyance of the fee. *Clark v. James*, 87 Hun, 215; *White v. Collins Con. Co.* 82 App. Div. 1; *Sonn v. Heilberg*, 38 id. 515; *Deeves v. Constable*, 87 id. 352; *Lewis v. Ely*, 100 id. 252; *Hubbell v. Warren*, 8 Allen, 173.

No person not a party to the easement contract in question could take a grant of an easement under it. The easement contract is a deed *inter partes*. *Murphy v. Lee*, 144 Mass. 371; Sheppard's Touchstone by Atherly, 237; *Moulton v. Faught*, 41 Me. 298; *Stockwell v. Couillard*, 129 Mass. 231.

A reservation in favor of a grantor in a deed operates as a grant back to the grantor from the grantee. *Goold v. Coal Co.* 2 DeG., J. & S. 600; *Finley v. Simpson*, 2 Zab. 311; *Cooper v. Louanstein*, 10 Stew. Eq. 285.

A reservation in a conveyance of land in favor of a stranger to the conveyance is void, both at law and in equity. *Murphy v. Lee*, 144 Mass. 371; *Tibbetts v. Tibbetts*, 66 N. H. 360; *Hornbeck v. Westbrook*, 9 Johns. 73; *Bridger v. Pierson*, 45 N. Y. 601; Tiedeman on Real Prop. sec. 843, p. 850; Jones on Easements, sec. 101; 1 Jones on Real Prop. sec. 528.

A deed must take effect upon its delivery or not at all, and only such grantees can take under it, except by way of remainder, as were in existence and ascertained when it was delivered. Delivery includes both parting with the deed by the grantor and acceptance of it by the grantee. *Fash v. Blake*, 44 Ill. 302; *Kingsbury v. Burnside*, 58 id. 310; *Hulick v. Scovil*, 4 Gilm. 159; 135 Ill. 79.

When the easement contract was delivered neither of the Beidlers owned any lot fronting on Fisk or Lumber street, and neither of them acquired title to any such lot until long after the easement contract was delivered, its de-

livery presumably being at the time of its date, and there being nothing to repel the presumption. There is no allegation, no claim, no proof nor finding, that anyone who owned land on Fisk or Lumber street when the easement contract was delivered (other than the dock company) ever accepted the easement contract or even knew of it. The Beidlers, therefore, did not answer the description of owners of lots fronting on Fisk street and Lumber street when the contract was delivered. As an immediate estate cannot be granted to a person not *in esse* and ascertained at the time of the delivery of the deed, it follows that the Beidlers could take nothing under the easement contract as the result of its operation. *Faloon v. Simshauser*, 130 Ill. 649; *Morris v. Caudle*, 178 id. 9; *Miller v. McAlister*, 197 id. 72.

The duty of repairing a way appurtenant to a dominant estate is imposed by the law upon the owners of the dominant estate, upon the theory that those who have the benefits should bear the burdens of the easement. *Jones on Easements*, sec. 821.

The facts that the owners of the Witbeck lands have never paid anything for the repair of the track south of the south line of lot 86, and that, except during certain considerable periods, the occupants of these lands have not used any of the track south of lot 86, cannot be given the effect of destroying the plain meaning of the contract. Mere non-user of the extension during intervals of time, no matter how long continued, is of no weight, unless there is a showing of a necessity to exercise the right of user, if it existed, accompanied with proof of a denial of the right to use and acquiescence in the denial. *Tinker v. Forbes*, 136 Ill. 221.

The acts of parties under a contract tending to show a practical construction of it are unimportant where the contract is plain and unambiguous, and such acts cannot prevail against the evident meaning of the contract. *Hill v. Priestly*, 52 N. Y. 635; *Newport Lodge v. Newport*, 138 Ind. 141; *Hutchins v. Dickson*, 11 Md. 29.

A street is a public highway, and the term excludes all idea that it is a private way. 27 Am. & Eng. Ency. of Law, (2d ed.) 102.

By a reference in an agreement between parties to a street as bounding land which is the subject matter of the agreement, a covenant is implied that the street exists and shall perpetually exist as an open highway, and an estoppel is raised against using the ground embraced within the street lines for purposes inconsistent with a highway. *Holloway v. Southmayd*, 139 N. Y. 390; *Zearing v. Raber*, 74 Ill. 409; *Earll v. Chicago*, 136 id. 278.

If the recognition in the easement agreement of Fisk and Lumber streets as public highways implied a covenant that they were such and should forever remain such, and estopped the parties from asserting to the contrary, it is impossible to reasonably claim that the dominant estate overlapped the lot lines and extended to the street centers. It makes no difference in the application of this rule that the plat is a common law plat or that the street has not been accepted by the public, since the question involved is simply one of private right. *Earll v. Chicago*, 136 Ill. 278; *Zearing v. Raber*, 74 id. 409.

Private easements in a street are independent of the public easements, and are in their nature indestructible by acts of the public authorities. *Holloway v. Southmayd*, 139 N. Y. 390.

The right conferred by a prescriptive user is confined, as to its extent, manner, character and location, to the user maintained during the entire period of prescription and can not exceed or outrun such prior user, and an alteration in the substance of the dominant estate will put an end to the prescriptive right. *Luttrel's case*, 4 Coke, 86; *Postlewaite v. Payne*, 8 Ind. 104; *Bank v. Reighard*, 204 Pa. 391; *Atwood v. Bodfish*, 11 Gray, 150; *Milner's S. Co. v. Railway Co.* 75 L. J. Ch. Div. 807; *New W. Corp. v. Stovell*, 54 id. 113; *Wimpliedon v. Dixon*, L. R. 1 Ch. Div. 362; *Wil-*

liams v. James, L. R. 2 C. P. 577; *Parks v. Bishop*, 120 Mass. 340; Jones on Easements, secs. 201, 291, 293, 826; *Ballard v. Dyson*, 1 Taunt. 279.

The owner of the dominant estate, whose easement is acquired by prescription, cannot change the use to a different use in substance, against the consent of the owner of the servient estate, even if the new use is less burdensome than the old. *Bank v. Reighard*, 204 Pa. 391; Jones on Easements, sec. 821.

Whether an easement be created by express grant or by prescription the use cannot be changed to a different one, even if the new use be beneficial to the servient tenement. *Kavanaugh v. Traction Co.* 127 Mo. App. 266; *Allen v. Water Co.* 92 Cal. 388.

WILSON, MOORE & McILVAINE, (ISHAM, LINCOLN & BEALE, of counsel,) for appellee the Commonwealth Electric Company:

It is well settled that easements may be created by covenant or agreement as well as by grant. Jones on Easements, secs. 104-106.

Agreements creating easements are construed as any other agreement is construed, so as to carry out the plain intent of the parties. *Field v. Leiter*, 118 Ill. 17; *Barber v. Allen*, 212 id. 121.

In the construction of agreements creating easements, the grant, in case of doubt, must be taken most strongly against the grantor. *Williams v. James*, 36 L. J. C. P. 256; *Dunn v. English*, 25 N. J. L. 126; 14 Cyc. 1201.

In cases of ambiguity the practical interpretation of the grant by the acts of the parties is resorted to to determine the meaning of the grant. Jones on Easements, sec. 389; *Winston v. Johnson*, 42 Minn. 498; *Hopper v. Barnes*, 113 Cal. 636; *Walker v. Railroad Co.* 215 Ill. 610.

Contracts made for the benefit of third parties may be enforced by the parties for whose benefit they were made.

Dean v. Walker, 107 Ill. 240; *Webster v. Fleming*, 178 id. 140.

Courts of equity will enforce agreements creating easements and restrictions on lands when the intention of the parties is clear, regardless of any privity of estate or of contract among the parties. *Parker v. Nightingale*, 6 Allen, 341; *Hubbell v. Warren*, 8 id. 173; *Whitney v. Railway Co.* 12 Gray, 359.

An easement or servitude may be created in favor of a stranger to a contract, and such easement or restriction will be enforced in his favor by a court of equity. *Hays v. St. Paul Church*, 196 Ill. 633; 2 Washburn on Real Prop. (4th ed.) 303; Washburn on Easements, (3d ed.) *63; *Gibert v. Peteller*, 38 Barb. 488; 87 Minn. 91.

Long continued non-user, accompanied by acts showing an intention to abandon the easement, constitutes an abandonment. Jones on Easements, 852, 863.

If the owner of an easement agrees or consents that a building may be erected on a right of way it amounts to an abandonment of the easement. (*Vogler v. Geiss*, 51 Md. 407.) His acts in relation to the matter are binding on his successors in title. *King v. Murphy*, 140 Mass. 254; *Snell v. Levitt*, 116 N. Y. 595; *Warshauler v. Randall*, 109 Mass. 586.

The Commonwealth Company has built extensive improvements in reliance upon the vacation, and the property owners in the block, especially those consenting to the vacation, are estopped to demand that the original condition be restored. *People v. Wieboldt*, 233 Ill. 572.

The contract creates an easement, and not a license. *VanOhlen v. VanOhlen*, 56 Ill. 528; *Yeager v. Manning*, 183 id. 275.

An executed license coupled with an interest in the land is irrevocable. *Woodward v. Seely*, 11 Ill. 157.

The question whether the user of the easement by this appellee for an independent part of its business is exces-

sive depends upon whether the user has been made in good faith and is necessary for the reasonable enjoyment of the dominant estate. If the user, pursuant to the contract, is reasonably necessary for the enjoyment of the dominant estate and is not colorable, then the user is not excessive, even if other property is benefited. *Harris v. Flower*, 74 L. J. 127; *Finch v. Railway Co.* L. R. 5 Exch. Div. 254; *Williams v. James*, 36 L. J. C. P. 256; *Gunson v. Healy*, 100 Pa. St. 42; *Simpson v. Godmanchester*, L. R. App. Cas. 696.

JOHN T. RICHARDS, for appellee the Chicago Title and Trust Company, executor.

Mr. JUSTICE CARTER delivered the opinion of the court:

Easements may be created by covenants or agreements as well as by grant. (Jones on Easements, secs. 104, 106.) Agreements imposing burdens upon one estate for the benefit of another must be strictly construed. (*Eckhart v. Irons*, 128 Ill. 568; *Downen v. Rayburn*, 214 id. 342.) Such agreements, however, creating easements must be so construed as to carry out the plain intent of the parties. (*Field v. Leiter*, 118 Ill. 17; *Barber v. Allen*, 212 id. 125.) In construing such instruments the court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted and the object to be attained, to ascertain and give effect to the intention of the parties. (*Kuecken v. Voltz*, 110 Ill. 264.) Construing this contract in the light of these surroundings, it seems obvious that its object was to furnish an outlet for business to the Burlington road for the lots between Allen's and Mason's canals. Not only is this indicated by the agreement, but that conclusion is supported by the terms of the contract entered into by the railroad company in 1864 with the owners of Greene's South Branch addition as to the right of property holders in said addition to build switches for business purposes from said

property to said railroad. The proposition that all the lots between said Mason's and Allen's canals south of Twenty-second street were to be permitted to use the curved switch track provided for in said agreement is further strengthened by the addenda made a part of the agreement, which provides that the owners of lots 101, 102 and 103 may use said curved track under certain conditions different from the conditions provided for the other lots in the main part of the agreement. Moreover, if there is any ambiguity as to the meaning of this contract, the practical construction placed thereon by the acts of the parties can be resorted to to determine the meaning of the grant. (Jones on Easements, sec. 389; *Walker v. Illinois Central Railroad Co.* 215 Ill. 610; *McLean County Coal Co. v. City of Bloomington*, 234 id. 90.) Such construction by the Beidlers and Witbecks shows that appellant's contention that only one track could be constructed south of the south line of lot 86 cannot be sustained, as several branch switches were constructed and in use south of that point for nearly forty years before these proceedings were started. It is obvious from the evidence in this record that the owners of lots 82 to 86 never claimed the right, under this agreement, to use the switches south of the south line of lot 86 from the time said agreement was executed until this controversy arose. Whatever doubt, therefore, there may have been under the original contract, this point must be held to be settled adversely to appellant's contention as to its present rights in said tracks south of the south line of lot 86. The fact that John H. Witbeck, who was the owner of lots 82 to 86 when said Fisk and Lumber streets were vacated by the city of Chicago, signed a petition requesting such vacation, shows clearly the intention of the then owner that the property might be used for private purposes and that any interest he might have therein was abandoned. His acts in relation thereto are binding upon his successors in title. (*Vogler v. Geiss*, 51 Md. 407; *King v. Murphy*, 140 Mass. 254.) We

cannot see how the vacation of Fisk and Lumber streets and the building of the fence across Fisk street, as heretofore set forth in the statement of the case, injuriously affected appellant's rights. Since such vacation the Commonwealth Company has built extensive improvements in reliance thereon, and the property owners in the block who consented to the vacation, or their successors in title, are estopped from demanding that the original condition be restored. *People v. Wieboldt*, 233 Ill. 572.

Had the practice of doing all the switching on the said curved track during the night time, except Sundays, been followed from the time the contract was executed, or even for twenty years continuously, and been adverse, such practical construction of the agreement would have tended strongly to uphold appellant's contention that the court below was wrong in deciding that the Commonwealth Company had unrestricted rights to the said easement day and night, but the facts as shown in this record indicate that the doing of such switching at night continued less than twenty years and was permissive rather than adverse. We are therefore disposed to agree with the holding of the trial court that the parties to said easement agreement, and their successors and assigns, have the right to use said switch track in common, for the purpose of transferring railroad cars at all times back and forth between said railroad track and the lots in question.

The contention is made that the easement created by said contract of February 28, 1865, was in gross and not appurtenant. This easement satisfies all the requirements of an appurtenant easement. The servient and dominant estates are clearly defined in the contract. An easement will not be held to be in gross if it can fairly be held to be appurtenant. (*Louisville and Nashville Railroad Co. v. Koelle*, 104 Ill. 455; *Kuecken v. Voltz*, *supra*.) If the dominant estate is clearly indicated and the easement is beneficial to such estate then it is appurtenant, and it is not necessary

that the dominant and servient estates should be contiguous or that the right of way should terminate, as claimed by appellant, on the dominant estate. (Jones on Easements, sec. 5; *Horner v. Keene*, 177 Ill. 390; *Cady v. Springfield Water-works Co.* 134 N. Y. 118.) We do not think *Garrison v. Rudd*, 19 Ill. 558, holds to the contrary.

It is further contended that section 13 of chapter 30, (Hurd's Stat. 1908, p. 491,) which provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance," etc., has no application to easements. As we understand the argument, it is that if a perpetual easement is to be granted, the word "heirs," or some other word that would convey a fee under the common law, must be inserted, and that the word "forever," as used in this agreement, does not answer that purpose. We think this question has been settled adversely to appellant's contention in *Tinker v. Forbes*, 136 Ill. 221, *Horner v. Keene*, *supra*, *Oswald v. Wolf*, 126 Ill. 542, and *Barber v. Allen*, *supra*. While the ruling of some courts is to the contrary, the weight of authority in this country agrees with the holdings of this court on this question. The dock company acquired a perpetual easement in the curved track across lots 82 to 86 as appurtenant to the lots owned by the dock company at the date of said easement contract,—that is, to lots 87, 88, 89, 90, 93 and the south half of lot 92. It is the settled law in this State that an easement created by a grantor in the lands of his grantee, in favor of the lands retained by the grantor and beneficial thereto, is appurtenant to the lands retained and binding on subsequent purchasers of the grantee's land. (Jones on Easements, sec. 392; *Kuecken v. Voltz*, *supra*; *Horner v. Keene*, *supra*.) Without question the authorities support the finding of the chancellor that the easement in said curved track under said agreement is appurtenant to said last named lots

for the benefit of the present owner, the Commonwealth Electric Company.

Appellant further insists that no person not a party to the easement contract can take the grant of an easement under it; that the easement contract is necessarily between the parties to it, and that only the dock company, or some one in privity with it, can successfully maintain a suit at law or in equity against the parties of the second part to enforce the provisions of said easement agreement. The trial court agreed with this contention as to a suit at law, but held, in effect, that this is a proceeding in equity and governed by equitable rules of procedure, and that therefore equitable defenses will be sustained and equitable rights enforced herein. (*Gage v. Caraher*, 125 Ill. 447.) Parol contracts for easements have frequently been given effect by the courts under the rule laid down by Jones in his work on Easements, (sec. 83,) that a parol contract for an easement, which equity will regard as equivalent to a grant, must be "made for a valuable consideration and accompanied by acts of part performance unequivocally referable to the contract." It has been held in this State that where a person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon such promise; and it is not necessary in such case that there should be any consideration moving from the third person in whose favor the promise has been made. (*Dean v. Walker*, 107 Ill. 540; *Webster v. Fleming*, 178 id. 140; *Ashelford v. Willis*, 194 id. 492.) Courts of equity will enforce agreements creating easements and restrictions on lands when the intention of the parties is clear. *Parker v. Nightingale*, 6 Allen, 341; *Hubbell v. Warren*, 8 id. 173.

Without attempting to set out the evidence in detail here, (it is referred to at some length in the statement of the case,) we think it is clear from this record that the owners of lots south of lot 86 served by the curved track

paid to the owners of lots 82 to 86 eleven-fifteenths of the original cost of the section of the curved track, as provided for in said easement contract; that this payment and acceptance was without question referable to the contract, and that the cost of maintaining said curved switch track to the south line of said lot 86 was likewise paid by the owners of lots south of lot 86 served by the curved track, in accordance with the terms of said easement agreement, and also clearly referable to it.

Appellant insists that the payment made under the said original contract should have been in the proportion of eleven-sixteenths to five-sixteenths instead of eleven-fifteenths to four-fifteenths, as shown by this record, and that as the Witbeck Company only paid in the proportion of four instead of five lots, the first contribution as to the original cost of the curved track cannot be referable to this agreement but must have been made under some independent agreement. While the first payment tends to uphold in some measure this contention, we think the testimony of Augustus Beidler and other evidence shows clearly that the payments, not only for the repair of the tracks but the original cost as provided for in such agreement, were made under this contract. Unless it was understood by the members of the Witbeck corporation and the Beidlers that such payments were being made under such contract, we can see no reason why the easement contract was restored by the then owners of the property and filed for record in 1874, after its destruction by the great fire in 1871.

We cannot sustain the claim of appellant that there can be no prescriptive rights as to some of the appurtenant lots because they were in the possession of tenants during the alleged prescriptive period. This claim is based on the argument that if the property is in the possession of a tenant the owner is prevented from acquiring an easement therein by prescription. This argument is answered by the fact that John H. Witbeck, who was then the owner of the ser-

vient lots, was collecting from the owners of the dominant lots moneys on account of the switch track,—and this during the time the tenants occupied the dominant lots. By reason of these payments and acquiescing in the user of the switch track by said appurtenant lots Witbeck waived all claim on this point. The evidence in this record shows conclusively that the owners of lots 87 to 93 and 33 to 39, inclusive, had been openly and notoriously using the said curved track for more than twenty years before this proceeding was instituted and in accordance with said easement agreement. The use of the curved track by said lots last mentioned being under the easement agreement and referable to it, the user must be held adverse. *Schmidt v. Brown*, 226 Ill. 590.

Appellant further contends that if it be assumed that the easement contract granted an easement for the benefit of any land fronting on Fisk or Lumber street, provided the owners accepted its conditions, such easement does not extend to the center of the street on which such lots abut. The determination of this question depends very largely on whether the plat of Greene's South Branch addition to Chicago conformed to the requirements of the statute in force at the time such plat was made. The record shows that the plat of the subdivision was executed and acknowledged by certain of the owners by their attorneys in fact. This was not in compliance with the statute. *Blair v. Carr*, 162 Ill. 362; *Gosselin v. City of Chicago*, 103 id. 623; *Russell v. City of Lincoln*, 200 id. 511.

It is argued, however, that Hance and Greene were the owners of all the property east of the center line of Fisk street at the time this plat was made and that they acknowledged the plat in person, and that therefore the plat as to the property they owned is a statutory plat, even though as to the other parts the owners did not comply with the statute,—that is, part of the plat is statutory and part common law. We cannot assent to this proposition. The plat is an

entirety. If any of the owners of property covered by the plat failed to comply with the statute it destroyed the validity of the entire plat as a statutory dedication. At the time the agreement was entered into, Fisk street had not been accepted by the public and the title of the abutting lot owners therefore extended to the center of the street. (*Hamilton v. Chicago, Burlington and Quincy Railroad Co.* 124 Ill. 235.) Parties will be presumed to have contracted with reference to lots by their legal boundaries. Upon the acceptance of Fisk street by the public the public easement became a charge upon the title of the property owners. Such private rights, however, have remained, subject only to the right of passage and use by the public. It appears to be conceded that the vacation of these streets was in accordance with the law. Such vacation, therefore, destroyed the public easement and restored the parties to the full enjoyment of their private rights in said lots. Manifestly, the easement under said contract extended to the center of the street on which the appurtenant lots in question abutted,—that is, the easement extended to the center of Fisk and Lumber streets as to lots 87 to 93, inclusive, and lots 33 to 39, inclusive.

The trial court held that lots 94 to 97 were not shown by the record to have any rights in this easement contract. We think this holding was correct. At the time the easement agreement was executed and the deed given by the South Branch Dock Company to the Witbecks for said lots 82 to 86 Caleb Allen was the owner of lots 94 to 97. As has been stated, he did not purchase stock in said dock company. While it is clear that it was intended that all of the lots between Mason's and Allen's canals, including those owned by Allen, should have the benefit of the easement contract under the conditions provided therein, no proof is found in the record that the owners of lots 94 to 97 contributed in any way to the original cost of the curved track or towards its repair. While there is some slight evidence

in the record that tends to show that some of the parties who occupied these lots, in connection with certain lots east of Fisk street, for lumber business used the curved track for the purpose of taking lumber to and from said lots 94 to 97, still this proof is very indefinite as to dates, length of time and amount of lumber moved. Indeed, the proof tends very strongly to show that said lots 94 to 97, inclusive, during most, if not all, of the time from the date when this contract was signed down to the time this controversy arose, used the switch track west of Fisk street, which curves south-easterly across said lot 105, for carrying materials between said Burlington road and the lots in question. It necessarily follows from what has been heretofore stated, that the right to use said curved switch track under said agreement is not attached to the west half of the vacated portion of Fisk street originally included within said lots 94 to 97; and it also follows that the trial court was right in holding that the Commonwealth Company, its successors and assigns, are not entitled to maintain the existing connection between said curved switch track and the track constructed by said company in 1902, branching towards the west from the track in Fisk street opposite the dividing line between said lots 88 and 89, as shown on plat 3.

In view of the conclusions heretofore reached that certain lots are appurtenant or dominant to and certain other lots are non-appurtenant or non-dominant to said easement in the said switch track, one of the most serious and far-reaching questions in this record is whether the present use of said curved switch track by the Commonwealth Company is excessive. The master reported and the court decreed that the easement was not appurtenant to the vacated portion of the west half of Fisk street,—that is, the land which had been a part of that street and was originally included in the eastern ends of said lots 94 to 97. The stipulation filed in this case shows that the ten turbines and generators for supplying electricity in this plant are located on this va-

cated portion of Fisk street; that at least one-half of each turbine is west of the center line of Fisk street. The precise question thus presented has never been passed on by this court, nor, so far as we are advised, by any other court. Somewhat similar questions, however, have been considered. In Jones on Easements (sec. 32) that author states: "An easement cannot be extended or made to attach to land other than for the benefit of which it was created. It cannot be made to attach to other land which the owner of a dominant estate may subsequently acquire. * * * A land owner conveyed part of his land to a stone company, together with a right to construct a line of railway over the remaining part to connect the land granted with a public railroad. (*Hoosier Stone Co. v. Malott*, 130 Ind. 21.) It was held that this easement was appurtenant to the land granted, and the stone company had no right to permit its use by third persons to convey stone quarried on lands owned by them." Again, that author states (sec. 360): "One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same enclosure with that to which the easement belongs. Except for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate. This rule is therefore applicable whether the way was created by grant, reservation, prescription or as a way of necessity. * * * The way is granted for the benefit of the particular land and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate. One having a right of way to his land blackacre over the land of another has no right to drive his cattle to blackacre and then to other land beyond it." *Howell v. King*, 1 Mod. 190.

A owned three lots, all of which were embraced in one pasture, and had the right to cross other land to go to

one of these three lots. He crossed this other land and went to one of his lots not dominant to the easement for the purpose of salting sheep, and on his return was assaulted by the owner of the land subject to the easement. The court held that he was a trespasser. *French v. Marstin*, 32 N. H. 316.

A person had a right to go over certain land to reach a three-acre lot. Adjoining this lot he also owned a nine-acre lot, the two not being separated by any fence. Having mowed the grass on his two lots he proceeded to load the hay, each load containing hay cut from each of the lots. An action in trespass was sustained. The court held that he could only enter the other party's land to go to the three-acre lot. *Davenport v. Lamson*, 21 Pick. 72.

One Jenkins was the occupant of a field called "nine-acre field" and of two adjoining fields called "Parrott's land." The nine-acre field had a right of way over plaintiff's land to the public highway. Jenkins mowed all three fields and stacked all the hay, in good faith, on the nine-acre field, afterward selling it to the defendant, James, who carried it across plaintiff's land to the highway, which was the alleged trespass. It was held that this was *not* an excessive user of the right of way. *Williams v. James*, 2 L. R. C. P. 577.

A private carriage road had been established for many years as a means of reaching certain enclosures of meadow and woodland. Afterward Finch and others acquired a portion of the premises, including the fee (subject to the easement) of the road, and erected thereon a large lunatic asylum. The defendant railway company acquired title to another portion of the premises and maintained thereon a cattle-pen, where large numbers of cattle were driven by means of the road and were collected and were then driven over the road to the railroad for shipment. Plaintiffs objected on account of the noise. The court held that this was a lawful user on the part of the railway company, and

that said company was not restricted to the user which existed at the time of the grant. *Finch v. Great Western Railway Co.* 5 L. R. Exch. 254. See, also, on this point, *Reise v. Enos*, 76 Wis. 634; *Webber v. Vogel*, 159 Pa. St. 235; *Greene v. Canny*, 137 Mass. 64; *Albert v. Thomas*, 73 Md. 181.

While the general principles that must control are easily stated, their application to the complex and intricate machinery of modern civilization is not in all cases simple or clear. Some decisions of recent date have been handed down that are more closely in point than the authorities heretofore referred to. An easement was imposed on certain land in favor of a lot called therein for convenience the "pink land," and afterwards a building was erected partly on said "pink land" and partly on adjoining premises called the "white land," which was not subservient to the easement. It was desired to use the building for manufacturing purposes and to use this easement for hauling and freight traffic for the benefit of all the building. The court refused such use. *Harris v. Flower*, 74 L. J. Ch. 127.

An automobile garage was erected on two lots, one of which was entitled to an easement over an alley connecting with the streets. The automobiles from the garage, both that part situated on the land dominant to the easement and that part not on said land, passed in and out of the alley. The court held that the proprietor of the garage might use the alley as appurtenant to that part of the garage dominant to the easement but not as a means of ingress or egress to and from the other portion of the garage by means of the portion which was dominant. *Diocese of Trenton v. Toman*, 70 Atl. Rep. (N. J.) 606.

A partition deed embracing a number of lots contained a provision that a certain alley should "be forever left open as a means of ingress and egress for the advantage of all the property hereinbefore conveyed and partitioned." Afterward the Broad Exchange Company acquired title to

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 refused such use.

An easement is a right
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one of said lots and to certain other lots not included in said partition deed, and proceeded to erect on all of said lots a large office building, designed for the accommodation of some seven thousand occupants. The heat and power plant was located on the premises dominant to the easement. The coal, ashes, paper and sweepings of the entire building were conveyed through the alley. The court issued an injunction against the owner of the building and its agents from using the easement until such time as the building should be so arranged as to permit the use of the easement for the advantage of the dominant tenement only. *McCullough v. Broad Exchange Co.* 101 N. Y. App. 566.

Counsel for the Commonwealth Company argue that as that company has so arranged its entire plant that the part which contains the boilers is on the dominant estate the use of the easement is not excessive, as the company uses the switch track to the dominant estate for the purpose of transferring coal to the furnaces and boilers located on the dominant estate, where the coal is consumed, and the ashes and cinders are then hauled away from the dominant estate over the track. They argue that the steam plant is located next the dynamo plant, where electricity is generated, and that the dynamo plant cannot be considered appurtenant to the easement, under these circumstances, any more than it could if the steam had been piped under the river to turbine wheels on the south side of said river; that the relative location of the steam plant and the dynamo plant is immaterial; that the use of the easement in hauling freight over the switch is not only within the letter but within the spirit of the contract, and counsel insist that the only question presented is whether such use of the easement is within the terms of the grant,—is unlawful and excessive because adjacent property receives benefit therefrom. To support their contention, counsel for the Commonwealth Company rely upon certain of the authorities heretofore cited, but especially upon the case of *Simpson v. Godmanchester*, L. R.

App. (1897) 696. In that case the court had under consideration the use of an easement to prevent the flooding of dominant lands. This easement consisted in the right to open sluices for the purpose of protecting from inundation certain lands adjoining the river, and had been exercised for two hundred years in times of actual or threatened flood. A suit was brought to restrain the exercise of this right, and it was held by the court that the lands that had so exercised it in previous years could still continue to exercise it, even though by so doing other lands not dominant were benefited, holding that "it is no objection to the exercise of a lawful right that it may indirectly benefit other persons or subjects which do not enjoy the same right." We think, however, the question in that case is clearly distinguishable from the one here presented. In that case no greater burden was imposed upon the servient estate, but here the burden imposed is increased and is in excess of the grant under the said easement agreement by the building being located partly on non-dominant estate, as herein set forth.

Counsel for the Commonwealth Company insist that if the rule contended for by appellant be upheld, a steel plant could not use a switch to haul iron and coal for the manufacture of steel billets onto the dominant estate if the billets were subsequently to be rolled into rails on non-dominant lands; that a furniture factory could not use the switch in connection with the manufacture of furniture if the furniture was subsequently to be finished on non-dominant lands; that a car company could not manufacture car wheels on dominant property and use the easement if the wheels were to be subsequently attached to cars on non-dominant property. Under all these illustrations it is argued that other lands would receive the benefit of such use. If this argument were sustained then the Commonwealth Company could have constructed a very small part of its building, containing only the boilers, on the appurtenant lots and

could have erected all the rest of the plant on non-dominant property, even though the plant covered acres of ground. No arbitrary or absolute rule can be laid down that will control in every case. The peculiar or special facts of each case must necessarily be taken into consideration in reaching a decision. As a general proposition, however, we think, if the entire plant is operated as a whole, that any integral, necessary or indispensable part of the entire plant cannot be situated on non-dominant estate. As we understand the question on this record, it is necessary for the creation of electricity not only that the boilers make the steam, but, as a part of the same creative act, the steam must be used in the turbine wheels to propel the generators, and the generators must at the same time be used for the purpose of generating electricity,—that is, the steam cannot be created as an independent factor. It cannot be transferred to non-dominant estate, and thereafter, an appreciable period of time intervening, used, by a distinct and independent act, for generating electricity, the same as the billets of steel can be transferred from dominant to non-dominant estate and later on changed into the form of rails, or the same as car wheels manufactured on dominant estate can afterwards be transferred to non-dominant property to be used in making cars. The steam plant is not a part of this plant distinct and separate from that part of the plant which generates the electricity. The two are connected together and both are essential in the operation of the electrical plant. How can it be said that they are any more distinct parts of the same plant than that the brain and heart are distinct and each working independently of the rest of the human body? The generators and steam plant are both a part of one uniform and indivisible plant and process. These turbines and generators cannot be operated without the continuous support and application of the steam. Counsel for appellant well argue that this steam plant is no more independent of the rest of the plant than would a steam plant on dominant

land in a flouring mill be from the shaft and machinery which grinds the grain on non-dominant land.

Counsel for the Commonwealth Company argue that the use of the switch by the non-dominant property is a reasonable one for the purposes of the dominant property, and that the Commonwealth Company erected its plant in good faith, without intending to subject the easement to a greater burden than was intended when the contract was originally entered into. We are inclined to think that this contention is sound to the extent of holding that the use of this unrestricted way is in good faith and reasonable in so far as the change of use is rendered necessary by using the dominant or appurtenant lots for their present use, instead of the former use of the curved switch track for lumber yards, but we do not think this rule of law can apply to its present use by the non-dominant lots. On principle and authority the holding of the trial court on this last point cannot be sustained. The entire plant of the Commonwealth Company, as shown on plat 3, both east and west of the center line of Fisk street, must be held to be one integral, indivisible and entire whole, and the use of the switch in hauling coal for this entire plant must be held to be an excessive user. The decree of the chancellor should have so found.

We are also disposed to hold that the trial court improperly decided that under this agreement the Commonwealth Company had the authority to connect the branch switch, as shown on said plat 3, opposite the middle part of said lot 85. Most favorably construed for the Commonwealth Company's contention, we do not think this easement contract by its terms was intended to allow more than one track north of the south line of said lot 86.

It is contended, however, that the construction placed upon this contract by the parties interested in years past permitted a branch or extra switch to be connected and built north of said south line of lot 86. The proof as to any

switch being built north of said south line of said lot previous to 1902 is not at all clear or satisfactory. It is true, there is some evidence in the record that one switch track branched off from the main branch or switch at some point opposite lot 86, but just how far north of the south line of said lot no witness testified, though all the evidence is that no switch track ever branched off north of lot 86.

Counsel for the Commonwealth Company contend that, even if this state of facts be admitted, appellant not having raised this question until the amendment of its petition filed in 1908, it therefore waived its right to raise it. Even if John H. Witbeck stood by and permitted the construction of the switch track without objection, it cannot be held that the Commonwealth Company acted in ignorance of its rights, and no delay short of the statutory period will bar the relief contended for. *Burrall v. American Tel. Co.* 224 Ill. 266; *Spalding v. Macomb and Western Illinois Railway Co.* 225 id. 585.

We think we have covered all the material points raised on this record. The facts are complicated and many of the questions difficult. We have been greatly aided in our study of the case by the well arranged and able briefs of counsel, together with the very complete statement of facts in the report of the special master.

The decree of the superior court will be reversed and the cause remanded, with directions to re-enter the decree modified in accordance with this opinion, so as to enjoin and restrain the appellee the Commonwealth Electric Company, its officers, agents and employees, from using said easement over said curved switch track in connection with any lands which (as specified in this opinion) are not dominant to said easement; also to enjoin and restrain said company, its officers, agents and employees, from using the said easement over said curved switch track in connection with the building containing the generating plant, until such

plant is so arranged as to permit the use of said easement for the advantage and benefit only of the lands that are dominant to it, without by the same act subjecting the easement to use in connection with non-dominant lands; also to enjoin and restrain said company, its officers, agents and employees, from the use of the switch track which branches off from the east of said main curved track opposite lot 85, unless and until said switch track is changed and re-built so as to connect with said main curved track not farther north than the south line of lot 86. In all other respects the decree will remain unchanged.

Reversed and remanded, with directions.

THE PEOPLE *ex rel.* John J. Healy, State's Attorney, Relator, *vs.* ARTHUR PATTISON, Respondent.

Opinion filed June 16, 1909—Rehearing denied October 6, 1909.

ATTORNEYS AT LAW—*attorney who uses client's money should be disbarred.* An attorney who collects money for a client should pay it over promptly, and if he uses it for his own purposes he is guilty of unprofessional conduct justifying his disbarment; and the fact that at the time he used the money his credit at the bank was greatly damaged by depreciation in value of securities he had given the bank as collateral is no excuse.

INFORMATION to disbar.

JOHN L. FOGLE, for relator.

CHARLES HUGHES, for respondent.

Mr. JUSTICE DUNN delivered the opinion of the court:

An information was filed against the respondent for his disbarment for having appropriated to his own use and failed to pay to his client money collected for the latter.

The respondent was admitted to the bar in June, 1892. He was then, and for some years afterwards, engaged in teaching and did not begin the practice of his profession until 1902, when he engaged in the collection business. In December, 1902, the Columbia Shade Cloth Company, through its agent, delivered to him for collection an account against L. Tozer & Son, of San Francisco, for \$2973.41. Through a correspondent in San Francisco he effected a settlement, and on May 30, 1903, received as the proceeds of the collection two checks, amounting to about \$2100, which he deposited in his bank, receiving credit therefor in his individual account. On May 29 the respondent's balance at the bank was \$135.35. During the month of June he drew checks on this account until it was reduced to \$8.56, which was his balance on July 1. No part of this money was paid to the Columbia Shade Cloth Company and no payment has since been made to it except \$15 paid on October 3, 1904, and \$7 paid at a later date. Respondent rendered services to the Columbia Shade Cloth Company on other claims, for which he charged between \$30 and \$40, and he made an assignment to it of a life insurance policy which was subject to a prior lien, which policy was canceled, leaving a balance, after payment of the prior lien, of \$33.20, to which the company was entitled. In August, 1903, the respondent gave to McDonald, the agent of the Columbia Shade Cloth Company, his check for \$1899.86 to pay its claim, but he had no money in the bank to meet the check and requested McDonald to hold it a few days, telling him he would notify him when to present it. This check was not paid though McDonald frequently requested respondent to arrange for its payment, and finally, in August, 1904, respondent gave his note for it, which was renewed, with his wife as surety, in December, 1904, and has never been paid. The evidence does not disclose with certainty what compensation respondent was entitled to retain, but it is not questioned that there is a considerable

sum due to the Columbia Shade Cloth Company which it has not been able to get from him.

The respondent's position is, that about the time he received the money his credit at the bank became greatly damaged by the depreciation of certain securities which he had deposited with the bank as collateral; that the company permitted him to retain the money, and that the fiduciary relation by virtue of which he received the money was so modified by the action of the parties that his relation to the Columbia Shade Cloth Company became, as to this transaction, merely that of a debtor. There is no evidence whatever to sustain the latter contention. There is nothing tending to show any agreement or understanding, express or implied, for any extension of credit to the respondent. On the contrary, McDonald frequently requested payment, with no result for fifteen months after respondent received the money. The question of his credit at the bank is entirely immaterial, for he needed no credit to pay over to his client the money received for it.

There is no justification for respondent's conduct. By virtue of his license to practice law he received the trust and confidence of his client, and the relation between them required of him at least common honesty. He had no right to use his client's money, collected by him as an attorney, for his own purposes. He should have paid it over promptly. His failure to do so was a gross breach of his professional duty and such misconduct in his office as shows him to be unworthy of a license to practice law in the courts.

The rule will be made absolute.

Rule made absolute.

KATHRYN E. REIFSCHNEIDER, Appellee, vs. WALTER E. REIFSCHNEIDER, Appellant.

Opinion filed June 16, 1909—Petition stricken October 7, 1909.

1. *MARRIAGE—legality of marriage in foreign State is adjudged by its laws.* The legality of a marriage taking place in a foreign State, when questioned in Illinois, is to be adjudged by the laws of the foreign State.

2. *SAME—presumption in favor of validity of marriage if ceremony is proven.* Where a marriage ceremony is shown, the law raises a strong presumption in favor of the validity of the marriage, and one who asserts its invalidity has the burden of proving such facts and circumstances as necessarily establish its invalidity.

3. *SAME—effect of failure to obtain consent of parents.* Unless the statute expressly declares that a marriage contracted without the necessary consent of parents or compliance with other preliminary requirements shall be a nullity, such requirements will, as a general rule, be held to be directory, only, and the marriage will be upheld though the disregard of the statutory requirements may entail penalties upon the licensing or officiating authorities.

4. *SAME—when a marriage in Indiana is not void.* A marriage in Indiana between residents of Illinois is not invalid though the license was obtained in Indiana and the parties, respectively eighteen and nineteen years of age, did not have the required consent of their parents or guardians, where both parties were capable of contracting the marriage under the laws of Indiana, the ceremony was performed by a properly authorized official, and it appears the parties went to Indiana solely to keep the marriage, which they both believed to be legal, a secret.

5. *SEPARATE MAINTENANCE—a wife residing in a foreign State may bring separate maintenance suit in Illinois.* A wife residing in a foreign State apart from her husband without her fault may maintain a separate maintenance suit in Illinois in the county where the husband resides.

6. *SAME—temporary alimony may be allowed where ceremony is admitted.* Temporary alimony may be properly allowed in a separate maintenance proceeding, where the defendant, in his answer to the rule to show cause, admits that there was a marriage ceremony but denies that the marriage was legal.

7. *SAME—allowance of alimony is largely a matter of discretion.* Whether alimony shall be allowed, and in what amount, is largely a matter of discretion with the trial court, and while such

discretion is subject to review it will not ordinarily be disturbed, on appeal, unless it has been clearly abused.

8. APPEALS AND ERRORS—*when certificate of importance is not necessary on appeal in separate maintenance.* Where the validity of the marriage, and not merely the amount of alimony, is directly involved on appeal to the Supreme Court from the Appellate Court in a separate maintenance proceeding, the fact that the amount of alimony does not exceed \$1000 does not require that a certificate of importance be obtained.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

April 3, 1907, appellee filed in the circuit court of Cook county a bill for separate maintenance against appellant, alleging their marriage on August 13, 1904, and that appellee had lived with appellant as his wife until about February 26, 1905, when she was compelled to separate from him. After the filing of the bill and before the filing of appellant's answer an order was entered by the court that appellant pay appellee five dollars each week for her support. Failing to comply with the order a rule was entered against appellant to show cause why he should not be attached for contempt of court. In his answer to the latter order appellant stated that he had been out of employment and was without any means or property out of which to pay said sum of five dollars per week, also setting up that the alleged marriage was illegal and void, as both parties thereto were minors and the parents of neither had given their consent to the marriage, and for the further reason that within a few months after the alleged marriage the parties thereto had agreed to disregard any marriage contracted between them, and that appellee shortly thereafter took up her residence in Pittsburg and had never requested appellant to live with her or support her. April 25, 1907, the appellant filed his answer denying the marriage and all

other allegations set out in the bill. May 8, 1907, the court ordered appellant to pay appellee, on account of solicitor's fees, the sum of \$50, and also entered an order committing him to jail for failure to pay the alimony as previously ordered by the court, there being \$10 due at that time. From such order of commitment appellant appealed to the Appellate Court.

On a hearing of the suit for separate maintenance the court found for appellee; that appellant was able to provide for her, and that he pay her the sum of \$7.50 per week from the date of the entry of the decree, \$14.60 which appellee had paid out to enable her to prosecute her suit, and the sum of \$100 for her solicitor's fees, and also costs of suit. From this decree an appeal was taken to the Appellate Court, where it was consolidated with the appeal from the contempt order. The Appellate Court affirmed the decree of the trial court in both appeals. Further appeals were prosecuted to this court from the judgments of the Appellate Court in both cases. The two cases were consolidated and heard together here on one record.

JOHN GIBSON HALE, for appellant.

ROBERT P. BATES, and WILLIAM H. EMRICH, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

August 13, 1904, the parties to this litigation, one being a little more and the other a little less than nineteen years of age, went to Hammond, Indiana, from their homes in Chicago for the purpose of being married, and the ceremony was there performed by the city judge of Hammond. They had become acquainted in a high school in Chicago which they had recently been attending, and had been keeping company and were engaged for some time previous. Appellant expressed a desire that they be married but that

it be kept secret until he became of age, on the ground that he was not able to support a wife. He told no one about the ceremony being performed, but appellee told her sister and a housekeeper in her father's house the evening she came back from Hammond. Her mother was dead. From that time she lived at her father's house in Chicago until his death and appellant lived at the home of his mother. In September, 1904, appellee obtained a position where she earned \$30 a month. At the time of their alleged marriage appellant was earning \$9 a week. It appears from the testimony that he never gave appellee any money for her support and he testified he could not support her. In February, 1905, appellant's mother found the marriage certificate and called up appellee on the telephone and asked her to come to her (appellant's mother's) home. Appellant, his mother, appellee and her brother-in-law, were present and the marriage was discussed. It appears that at this conference appellant's mother wished them to start housekeeping and that appellee expressed a willingness to do so, while appellant, although not doing much talking, stated that he would not live with appellee,—that he could not support her. Appellee's brother-in-law offered them a home with himself and his wife until they could get settled in a flat of their own. While the testimony is not in entire harmony as to what took place there, it is plain that no agreement was reached because appellant refused to live with appellee. The evidence shows that after the marriage appellant called on appellee at her father's home nearly every evening until the conference just referred to. The appellant testified that they had sexual intercourse within two or three days after the marriage ceremony, in the belief that they were married, and it is quite evident from the testimony that such sexual relations were continued until the conference of February, 1905.

An exemplified copy of the marriage license issued by the clerk of the circuit court of Lake county, Indiana, and

a marriage certificate signed by the city judge of Hammond, Indiana, were both introduced in evidence. Counsel for appellant urges many objections to both of these documents being introduced. We deem it sufficient to say that they were properly authenticated and received in evidence. 1 Bishop on Marriage and Divorce, (5th ed.) secs. 463, 473; *Tucker v. People*, 122 Ill. 583; Hurd's Stat. 1908, chap. 89, sec. 12, p. 1400.

Appellant contends that the marriage was not in conformity with the statutes of Indiana, and therefore not valid. The legality of this marriage must be adjudged by the laws of Indiana. *Lyon v. Lyon*, 230 Ill. 366; *McDeed v. McDeed*, 67 id. 545; *Butler v. Butler*, 161 id. 451; *Cannale v. People*, 177 id. 219; 26 Cyc. 829.

The Revised Statutes of Indiana were introduced on the trial of the cause below. Section 7292 of said statutes provides that "before any persons, except members of the Society of Friends, shall be joined in marriage they shall produce a license from the clerk of the circuit court of the county in which the female resides, directed to any person empowered by law to solemnize marriages, and authorizing him to join together the persons therein named as husband and wife." Proper proof was made that the city judge of Hammond had authority to perform the marriage ceremony. Counsel for appellant contends that the testimony of both appellant and appellee shows that no license was obtained. Appellee's testimony shows that she understood from appellant that he obtained a license. His testimony on this subject is very vague and uncertain. The mere fact that Hammond, Indiana, is shown not to have been the county seat does not prove that a proper license was not obtained before the marriage ceremony, from the clerk of the circuit court. Furthermore, section 7295 of the Indiana statutes provides that "no marriage shall be void or voidable for want of license or other formality required by law if either of the parties thereto believed it to be a legal mar-

riage at the time." Manifestly, from the evidence already referred to, both parties to this marriage contract believed it was legal at the time, and there is no contradiction of the fact that the ceremony was performed. ' This court, in *Cartwright v. McGown*, 121 Ill. 388, said, on page 396: "When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed." The parties to this marriage were capable of assenting to and did assent to the marriage ceremony. Their relations thereafter showed that they understood they were married. When a marriage is shown the law raises a strong presumption in favor of its validity, and the burden is cast upon the party objecting to the validity to prove such facts and circumstances as necessarily establish its invalidity. *Jones v. Gilbert*, 135 Ill. 27.

Counsel for appellant argues that the parties intended to conceal their marriage and not live together openly for two years, and that this proves they were never legally married. This contention cannot be sustained. The authorities he cites on this point were cases where no marriage ceremony was performed and where it was contended that a common law marriage had taken place. These authorities are not in point.

It is contended that the license was illegal because the Indiana statute already quoted required the license from the circuit clerk to be obtained in the county where the female resided, and the appellee did not reside in Lake county, Indiana; that the marriage was invalid for the further reason that the Indiana statute required that when minors were married they should obtain the consent of their parents. The Indiana statute in force at the time of this marriage ceremony provided that males of the age of eighteen and females of the age of sixteen years were capable of entering into the marriage contract. Appellant gave his age

to the public official in Indiana as twenty-two. The argument is also made that the marriage is invalid because the contracting parties went to Indiana to avoid the Illinois law, which required them to have the consent of their parents or guardians before the marriage ceremony could be performed. The proof indicates they had the marriage performed in Indiana, rather than in this State, in order to keep it a secret, and for no other purpose. Apparently neither of the contracting parties was familiar with the requirements of either the Illinois or Indiana statutes as to marriage. Our attention has not been called to any provision of the Indiana law that rendered the marriage ceremony void for any of these reasons and we are aware of no provision in the Illinois statutes to that effect. The general rule is, that unless the statute expressly declares a marriage contracted without the necessary consent of the parents, or other requirements of the statute, to be a nullity, such statutes will be construed to be directory, only, in this respect, so that the marriage will be held valid although the disobedience of the statute may entail penalties on the licensing or officiating authorities. (26 Cyc. 835, and authorities there cited; see, also, *Campbell v. Beck*, 50 Ill. 171; *Olsen v. People*, 219 id. 40.) We think, under section 7295 of the Indiana statute heretofore quoted and the authorities already cited, that these contentions of appellant cannot be upheld.

Appellant, in 1905, brought suit in the superior court of Cook county to annul the marriage, alleging that it was invalid. This bill appears to have been dismissed for want of equity. The pleadings in that case were introduced but they do not seem to have been made a part of the record or bill of exceptions. There may be good ground for urging, although we cannot, from the facts shown in the record, make a definite finding as to this point, that the decree dismissing the bill for want of equity is *res judicata* as to the validity of the marriage.

Appellant further contends that appellee was without authority, under our law, to file the bill here in question in this State, as she was a resident of Pennsylvania, and not of Illinois, at the time. Some time after this marriage took place her father died, and a short time thereafter she went to live with an aunt in Pennsylvania. Generally speaking, the residence of the wife follows that of the husband. (*Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Davis v. Davis*, 30 id. 180; *Dorsey v. Brigham*, 177 id. 250.) Our attention has been called by counsel for appellant on this point to *Way v. Way*, 64 Ill. 406, *Chapman v. Chapman*, 129 id. 386, *Hill v. Hill*, 166 id. 54, and *Becklenberg v. Becklenberg*, 232 id. 120, as holding that under the circumstances shown on this record appellee's residence was not in Illinois. We need not decide as to their application as these cases were all divorce proceedings, and the statute as to divorce is worded somewhat differently on the question of residence from the statute governing proceedings as to separate maintenance. This latter provides that the wife may institute proceedings "in the county where the husband resides." (Hurd's Stat. 1908, p. 1181.) Obviously, the separate maintenance statute gave the appellee the authority to commence the proceedings in this State in the county where appellant resided. The marriage being legal, it was the husband's duty to provide appellee a home, and this he failed to do. She was living apart from him through no fault of her own.

Appellant contends that the trial court improperly ordered the payment of temporary alimony when the fact of the marriage was in dispute. Appellant's answer to the rule to show cause why he should not pay this alimony admitted the fact of the marriage ceremony but denied its validity. Temporary alimony *pendente lite* may be allowed without a marriage being proved, though a *prima facie* case should be required to be shown in behalf of the wife. (2 Am. & Eng. Ency. of Law,—2d ed.—p. 101, and cases

there cited.) The marriage ceremony being admitted and only the legality questioned, the court was justified in allowing temporary alimony. It is no objection to the allowance of alimony pending the wife's bill for separate maintenance that the husband denies the facts alleged by her. The court may, if it deems necessary, enter into a sufficient examination to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings. *Harding v. Harding*, 144 Ill. 588; *Cooper v. Cooper*, 185 id. 163.

The appellant also contends, in this connection, that the court allowed excessive alimony and solicitor's fees in view of the financial condition of appellant. The record shows that since his marriage he has received some help from his mother and that at the time of the hearing he was earning \$15 a week. It was also admitted that under the will of appellant's grandfather his mother was to receive the income from a life estate to be paid her annually, the value of which, according to the trustee's report, was over \$150,000 in 1905, which estate, upon the death of appellant's mother, was to be distributed equally among the surviving children or their descendants. Appellant has no present interest in this estate and no other property. Whether alimony shall be allowed, and the amount, rests in the sound judicial discretion of the court, to be exercised in view of the nature and conditions of each case. While the abuse of the discretion is necessarily subject to review, unless there has been clearly such an abuse the decree will ordinarily not be disturbed on appeal. (*Harding v. Harding, supra.*) We do not think there is any such abuse shown on this record.

Counsel for appellant further contends that the answer of appellant to the rule to show cause why he should not be committed for non-payment of the \$10 alimony showed clearly that he was unable to pay it and that therefore the

court was without authority to commit him. Appellant has persistently refused from the first to pay any alimony, and while his salary is not large, he has had sufficient means to litigate these two suits, not only in the Appellate Court but in this court. We think, on the record before us, the order committing him for failure to pay \$10 alimony was fully justified. See on this point *Barclay v. Barclay*, 184 Ill. 471.

Appellee made a motion in this court to dismiss the cause, no certificate of importance having been given by the Appellate Court, because under the statute no appeal could be taken from the judgment of the Appellate Court to this court, citing in support of this contention, *Umlauf v. Umlauf*, 103 Ill. 651, *Miles v. Miles*, 200 id. 524, and *Kouka v. Kouka*, 221 id. 98. These authorities hold, in effect, that when the temporary alimony ordered by the trial court does not exceed \$1000, and that is the only question raised by the assignments of error in this court, no appeal is allowed from the Appellate Court; but it is plainly intimated in those decisions that if the legality of the marriage were involved the appeal might be allowed. This court, in discussing former section 90, (now section 121 of the Practice act, Hurd's Stat. 1908, p. 1639,) in *Baber v. Pittsburg, Cincinnati and St. Louis Railway Co.* 93 Ill. 342, said, on page 355: "Inasmuch as the ninetieth section and the provisions of the eighth section, [of Appellate Court act,] which relate to the specific classes therein provided for, have reference only to such legal proceedings as are instituted to recover either chattels or money, it follows that there is yet another class of cases which do not directly involve property rights, and, therefore, do not fall within either of the three classes above mentioned. This class of cases will include bills for divorce, actions of *mandamus*, and certain classes of bills for injunctions, where they are not, in effect, brought to recover chattels or a money demand. In all cases of this character, not directly involving

property rights, an appeal or writ of error lies without regard to the magnitude of the interests involved." To the same effect are *Hyslop v. Finch*, 99 Ill. 171, and *Chalcraft v. Louisville, Evansville and St. Louis Railroad Co.* 113 id. 86. The appeal in this case directly involved the validity of the marriage, without regard to the magnitude of the interests involved. The motion to dismiss must therefore be refused.

The judgments of the Appellate Court, both as to the commitment for contempt for failure to pay the temporary alimony and the decree awarding separate maintenance with allowance for support and solicitor's fees, will be affirmed.

Judgments affirmed.

JOHN G. SLATER *et al.* Appellees, *vs.* JOHN A. TAYLOR *et al.*
Appellants.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. CORPORATIONS—*statutory liability of directors is for indebtedness in excess of amount of capital stock.* Under section 16 of the act concerning corporations the liability of directors and officers is for indebtedness in excess of the *amount* of the capital stock, and not for indebtedness in excess of the *value* of the capital stock or the assets of the corporation.

2. SAME—*directors may incur indebtedness to amount of capital stock without assuming personal liability.* The *amount* of capital stock of a corporation is the amount contributed by the shareholders for the prosecution of the business, and the officers and directors may incur indebtedness equal to that amount without assuming personal liability.

3. SAME—*section 16 of the Corporations act takes no account of the property of corporation.* For the purpose of valuation under the Revenue act the term "capital stock" includes the assets of the corporation, and the value of the capital stock depends upon the assets and property of the corporation and their amount; but section 16 of the Corporations act takes no account of the property of the corporation, and having fixed the "amount" of the capital stock as the point where officers and directors must assume per-

sonal liability, it makes no difference, as to such liability, what the assets are when the excessive debt is created.

4. SAME—*personal liability of directors and officers is that of a surety.* The statutory liability of directors and officers of a corporation, under section 16 of the Corporations act, is that of a surety, and if the excessive indebtedness is paid out of the assets of the corporation the officers and directors are exonerated.

5. SAME—*directors and officers are liable if they assent to creation of excessive indebtedness.* While directors and officers of a corporation will not be personally liable under section 16 of the Corporations act by merely recognizing the existence of an excessive debt after it was created, yet if they assent to the creation of an indebtedness which necessarily and to their knowledge, as the governing body, will exceed the amount of the capital stock, they are liable, as sureties, for the excess.

6. SAME—*when manager of a corporation may recover against officers and directors.* The fact that the manager of a grain elevator corporation participated, by buying grain, in creating a debt in excess of the amount of the capital stock does not preclude him from enforcing the personal liability of the officers and directors, the same as any other creditor, to recover the commissions and expenditures to which he is entitled under the contract of his employment by the directors and for which it is not denied that the corporation is liable.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Douglas county; the Hon. SOLON PHILBRICK, Judge, presiding.

LEFORGEE & VAIL, for appellants:

If the indebtedness of a stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation. Rev. Stat. chap. 32, sec. 16.

This statute, although it is not penal, should be strictly construed. *Woolverton v. Taylor*, 132 Ill. 206; *Lewis v. Montgomery*, 145 id. 30.

This statute does not prohibit excess of indebtedness, but it makes the directors secondarily liable, as sureties, for

the amount of the excess. *Horner v. Henning*, 93 U. S. 228; *Woolverton v. Taylor*, 132 Ill. 210; *Rice Co. v. Libbey*, 85 Fed. Rep. 821.

To become liable, directors must actually create or assent to the creation of the indebtedness. *Lewis v. Montgomery*, 145 Ill. 30.

The recognition of an indebtedness by the directors, after its creation, will not make them personally liable. *Lewis v. Montgomery*, 145 Ill. 30; *Sullivan v. Sullivan Manf. Co.* 24 S. C. 341; *Bank v. Paige's Exrs.* 53 Vt. 452.

The creation of the debt by an agent of the corporation appointed by the directors will not make them personally liable, because he is the agent of the corporation and not of the directors. *Lewis v. Montgomery*, 145 Ill. 30.

Directors are liable for the amount of excess, but not to particular creditors. The liability constitutes a fund for the benefit of all creditors. *Horner v. Henning*, 93 U. S. 228; *Low v. Buchanan*, 94 Ill. 76.

In calculating the indebtedness the liability of the company to its stockholders is not considered. *Thompson on Corporations*, par. 4264.

The liability arises only after the corporate assets are exhausted. *Rice Co. v. Libbey*, 85 Fed. Rep. 821.

If the corporation is not liable the directors are not liable. *Thompson on Corporations*, (2d ed.) sec. 1374.

Since the complainants are only creditors and the statute is not penal, the complainants may waive or be estopped to enforce the liability of directors, and to recover they must come into court with clean hands and may not recover if their conduct is tainted with fraud. If any one of complainants does not come into court with clean hands the suit must fail as to all. 19 Cent. Dig. sec. 266.

The law has absolutely inhibited an agent or trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligations to his principal or where his position would

afford him an opportunity to speculate in trust property. *Smythe v. Evans*, 209 Ill. 376; *Railroad Co. v. Kelly*, 77 id. 426; *Pearson v. Railroad Co.* 13 Am. & Eng. Ry. Cas. 102; *Cottom v. Holliday*, 59 Ill. 176; *Hughes v. Washington*, 72 id. 84.

ECKHART & MOORE, for appellees:

The personal liability imposed by the provisions of the statute, that the officers and directors shall be personally and individually liable for the excess above the capital stock, is secondary, and can be resorted to only after the corporation itself has been exhausted, and can then be enforced only by a suit in equity where all the creditors and the corporation itself are parties or represented, when an accounting can be had and all the facts ascertained and the equities adjusted. *Bank v. Dillingham*, 147 N. Y. 603; *Woolverton v. Taylor*, 132 Ill. 197; *Sturges v. Benton*, 72 Am. Dec. 587.

The statute makes the officers who assent to the increase of the indebtedness of the corporation beyond its capital stock guilty of a violation of its trust, and, so far as this excess is necessary, they are required to make good the debts of their creditors who have suffered by their breach of trust. *Woolverton v. Taylor*, 132 Ill. 197; *Margarge & Green Co. v. Ziegler*, 9 Pa. St. 442.

Where an officer of the company knows that an act is being done or about to be done, and if, with such knowledge, he neither objects to nor opposes it when his duty requires and when he has an opportunity of doing so, this is "assent," within the meaning of the statute. *Patterson v. Stewart*, 41 Minn. 84.

The liability imposed upon directors by section 16 of the Corporations act cannot be waived by agreement. That liability is absolute, and was secured to the creditor bank on the ground of public policy, and the directors cannot get rid of it by any waiver or agreement with the bank's cashier.

Crane v. French, 38 Miss. 503; *Zachmann v. Zachmann*, 201 Ill. 390; *Hand v. Cole*, 88 Tenn. 402; *Publishing Co. v. Car Wheel Co.* '95 id. 634; *Allison v. Coal Co.* 87 id. 62.

A corporate creditor's agreement that stockholders shall not be individually liable on a debt does not relieve directors from their statutory liability. *Swancoat v. Remsen*, 78 Fed. Rep. 592.

Section 16 is founded on public policy. Cook on Stockholders, (3d ed.) sec. 214; *Hand v. Cole*, 88 Tenn. 402; *Allison v. Coal Co.* 87 id. 62; *Publishing Co. v. Car Wheel Co.* 95 id. 634.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The purpose of this suit is to recover from the appellants, as directors of the Garrett Grain and Coal Company, a corporation organized in 1902 with a capital stock of \$5000 to run a farmers' elevator and buy and sell grain and coal and handle hay and straw, the indebtedness of said corporation in excess of the amount of the capital stock. The corporation became insolvent and went into the hands of a receiver on March 14, 1904. The assets were insufficient to pay the debts, and the bill in this case was filed March 1, 1905, in the circuit court of Douglas county, by the appellees, as partners under the name of "The Citizens' Bank of Garrett," and one of them, Claus D. Greve, in his own right. The appellees filed the bill in their own behalf and in behalf of all other creditors who might become complainants in the suit, and charged appellants with liability under section 16 of the act concerning corporations, (Laws of 1871-72, p. 296,) which is as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation." The defendants denied that they assented to the indebted-

ness in question or became liable under the statute, and the issues were referred to Guy R. Jones, as special master in chancery. He took and reported the evidence, with his conclusions of fact and law, and the cause was heard upon exceptions to the report. A decree was rendered against the appellants for the excess of the indebtedness over the capital stock, and the Appellate Court for the Third District affirmed the decree except as to some errors and mistakes in amounts. The cause was remanded to the circuit court, with directions to amend and correct the decree to conform to the opinion, and from the judgment of the Appellate Court this appeal was taken.

The capital stock of the corporation was \$5000, and the first act of the directors was to buy an elevator and borrow part of the money to pay for it and also money to buy grain. They hired J. W. Laughlin as manager and agreed to pay him a commission on the amount of grain he should buy. His compensation being determined by the amount he could buy, he was quite active in that direction, and continued to buy grain after the elevator and cribs were full and advanced money on grain to be delivered in the future. The corporation was soon indebted to the First National Bank of Garrett to the amount of \$20,000, and that bank demanded new notes endorsed by the directors and a note for an overdraft constituting part of the indebtedness. The directors then transferred their account to the Citizens' Bank of Garrett, owned by the complainants, and notes of the corporation were executed by the president and secretary to the Citizens' Bank under a resolution adopted March 7, 1903, for \$19,700, and the proceeds, with a check for \$300, were used to discharge the debt to the First National Bank. The corporation continued buying grain, and about two months later the directors hired Claus D. Greve, one of the complainants, who was cashier of the Citizens' Bank, to buy grain on commission. He bought grain, and under his management the amount of indebtedness fluc-

tuated from time to time but it was never extinguished. There was a conflict in the evidence as to the extent of the supervision of the defendants over Greve, but the evidence in the record is sufficient to support the finding of the court that the defendants, as directors, assented to the creation of the indebtedness, and that it was not created by an agent of the corporation without the authority and assent of the defendants. The defendants were the governing body of the corporation and they authorized Laughlin and Greve to buy grain, which necessarily and to their knowledge would, and did, cause the corporation to become indebted in excess of the amount of the capital stock. It is true that the defendants would not be liable under the statute if they merely recognized the existence of the indebtedness after it was created, but the evidence justified the conclusion that they assented to the creation of the indebtedness.

The statutory liability is for indebtedness in excess of the amount of the capital stock, and not for indebtedness in excess of the value of the capital stock or the assets or property of the corporation. The amount of the capital stock is the amount contributed by the shareholders for the prosecution of the business, and the officers and directors may incur indebtedness equal to that amount without assuming personal liability. Capital stock for the purpose of valuation, as the term is used in the Revenue act, includes the assets of the corporation, and the value of the capital stock depends upon the assets and property of the corporation and their amount. This statute takes no account of the property of the corporation, and it makes no difference what the assets are when the excessive debt is created. The statute fixes a point where the directors become liable, and that point is when the indebtedness exceeds the amount of the capital stock. The liability is that of a surety, and if payment is made out of the assets, the officers and directors, who are sureties, are exonerated. (*Woolverton v. Taylor*, 132 Ill. 197; *Lewis v. Montgomery*, 145 id. 30.) The in-

debtedness of this corporation exceeded the amount of the capital stock, and the defendants became sureties for the excess which the assets were insufficient to pay.

It is urged that there is no liability to the complainants because the cashier, Claus D. Greve, one of the partners, told the directors if they would transfer the business to his bank he would not require them to endorse the notes of the company and would not hold them personally liable. He did waive the endorsing of the notes by the defendants, but there is no evidence of any agreement concerning the statutory liability.

It is also urged that Greve, who was the manager, ought not to have any part of the fund because he participated in creating the indebtedness. Under the contract with him he was entitled to his commissions and expenditures the same as any other creditor, and we see no reason why he could not recover the same. There is no claim that the corporation was not liable to him, and if the defendants assented to the arrangement the statute made them liable.

The judgment is affirmed. *Judgment affirmed.*

JOHN W. CLARK, Appellant, vs. AARON A. ADKISSON,
Appellee.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

EJECTMENT—*when deed by executrix may be presumed to have been properly made.* A deed made by the grantor, as executrix of her deceased husband's estate, may be regarded, after the lapse of many years, as within the power given to her by the testator's will to sell land in due course of administration, where it may be fairly presumed, from the facts shown by the record, that the sale was made to raise money to pay the widow's award. (*Clark v. Clark*, 172 Ill. 355, explained.)

APPEAL from the Circuit Court of McDonough county;
the Hon. JOHN A. GRAY, Judge, presiding.

PHILIP E. ELTING, and TUNNICLIFF & GUMBART, for appellant.

VOSE & CREEL, for appellee.

MR. JUSTICE CARTER delivered the opinion of the court :

This is an action of ejectment brought by the appellant against appellee in the circuit court of McDonough county for the possession of forty acres of farm land in that county. After the case was at issue, jury was waived and the cause submitted, by agreement of the parties, to the court. It appears that this is the second trial, as provided under the ejectment statute. The court found for the defendant and entered judgment against plaintiff for costs, whereupon an appeal was prayed and allowed to this court.

The parties stipulated that one John P. Clark, the father of appellant, died testate October 18, 1883. A copy of his will is set out in full in *Clark v. Clark*, 172 Ill. 355. The will provided that after the payment of his debts his wife was given all the property, "both real and personal, for and during her natural life," and that after her death whatever remained unexpended was to be applied to the payment of certain legacies to certain children, and after the payment of such legacies the remainder was to be divided equally between the appellant and certain other designated persons. By the last clause of the will he appointed his wife as executrix, and authorized and empowered her "to sell and convey any and all real estate and personal property of which I may die seized, using her own discretion therein." The wife was appointed and qualified as executrix October 22, 1883. She filed her inventory October 27, 1883, which contained the land involved in this litigation. On November 6, 1885, describing herself as "executrix of the last will of John P. Clark, deceased," she executed and delivered a deed to John McIntyre of said forty acres, the consideration being \$300, reserving the right to go onto

said property any time within the next nine years to remove five walnut trees. Said deed was acknowledged before the then county judge of that county. The parties hereto further stipulated that the \$300 was a fair cash value of the land sold at the date of the sale, and that the appellee now holds possession of said premises under a series of *mesne* conveyances from the widow and heirs of said John McIntyre, grantee in said deed, and that said appellee and his grantors have held continuous, open, notorious and undisputed possession of said property from the date of said deed to said McIntyre up to the time of serving notice of these proceedings and during said time have paid all the taxes thereon; that said appellant is a son of said John P. Clark, deceased; that the appraisement bill filed in the said county court in the estate of the said John P. Clark shows personal property amounting to \$1013.78 belonging to said estate and fixes the widow's award at \$700; that after diligent search of the records in the office of the county clerk no order directing the executrix to make the deed or sale in question could be found or any record thereof, or any petition for such order, or to make a deed or make the sale in question or record thereof, and that no claim or the record of any claim filed or allowed against the estate of said John P. Clark could be found in the records of said county clerk between the date of the death of said John P. Clark and the date of the deed here in question; that the estate of said John P. Clark had not been closed nor the executrix discharged at the time the deed in question was executed.

It is contended by counsel for appellant that under the decision in *Clark v. Clark, supra*, the executrix, Mary Clark, only conveyed by this deed her life interest in said forty acres. In said case this court had under consideration the power of the executrix to deed certain real estate to one James S. Clark "in consideration of \$100 in hand paid and in further consideration of services rendered and to be ren-

dered by James S. Clark." The date of the deed in that case was March 22, 1897, and in discussing that deed, and the power, under the will, to execute it, this court stated (p. 359): "Testimony is introduced to show that the services contemplated by the language thus used were the care of the grantor as long as she should live. This, we think, was an act unauthorized by her power. The only sale which she could have properly made, in her capacity as executrix, was one for money and in the usual course of administration of her husband's estate."

On the facts heretofore stated, as found in this record, was the executrix authorized to execute the deed here in question? We are disposed to so hold. It is argued by appellant that there were no debts against the estate. The testimony shows that appellant paid the funeral expenses right after his father's death, because, as he says, his mother could not count money and look after such matters. The evidence does not show that he paid the funeral expenses out of his own money and nothing is said as to the payment of the widow's award. *Clark v. Clark*, *supra*, is based largely on the holding in *Griffin v. Griffin*, 141 Ill. 373. Applying the reasoning of this last case, it is fair to presume from the facts presented here that this land was sold to raise money to pay the widow's award. This sale was made for cash, and it is stipulated that the amount received was what the property was really worth at that date. We think the evidence clearly shows that it was made in due course of administration of the estate of the testator. Under the rules of law laid down in both these decisions cited, we hold that the executrix was authorized, under the will, to execute the said deed. The other questions raised in the briefs need not, therefore, be discussed.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

HENRY G. METZGER, Appellant, vs. WILLIAM B. MANLOVE, Appellee.

Opinion filed June 16, 1909—Petition stricken October 7, 1909.

1. INSTRUCTIONS—*when an instruction as to disregarding testimony is not necessarily ground for reversal.* An instruction permitting the jury to disregard the uncorroborated testimony of any witness who they believe has been "successfully impeached," without explaining the meaning of such term, is objectionable, in that the jury may understand the term to apply to witnesses who have been contradicted by other witnesses; but whether the giving of such instruction is reversible error depends upon whether it appears from the whole record that the jury might have been misled and the opposite party prejudiced by it.

2. PARTNERSHIP—*liability of secret partner does not extend beyond scope of business.* While the liability of a secret or dormant partner to third persons does not depend upon their knowledge or belief as to the existence of the partnership, yet it is essential to such liability that the credit be given in a transaction within the scope of the partnership affairs, and he is not liable on individual contracts of other partners with respect to their personal matters.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Hancock county; the Hon. ROBERT J. GRIER, Judge, presiding.

CHARLES J. SCOFIELD, and APOLLOS W. O'HARRA, for appellant.

J. N. CARTER, T. B. PAPE, VOSE & CREEL, J. W. WILLIAMS, and S. P. LEMMON, for appellee.

Per CURIAM: This is an action of assumpsit brought by Henry G. Metzger against William B. Manlove and J. E. Manlove to recover about \$16,000, for which the defendants were alleged to be jointly liable. The declaration contained only the common counts and charged a joint liability. William B. Manlove, who was the only defendant

served, denied that he was jointly liable and verified his pleas, setting up this defense by affidavit. Upon the first trial of the issue formed on these pleas a judgment was rendered against the defendants for the full amount of the plaintiff's claim. Upon an appeal to the Appellate Court for the Third District that judgment was reversed and the cause remanded for a new trial. A second trial was had, resulting in a judgment against the plaintiff for costs, and that judgment having been affirmed by the Appellate Court, plaintiff has brought the record to this court for review.

This suit was brought to recover an overdraft in appellant's bank in Plymouth, Hancock county, Illinois, resulting from the payment of checks drawn on said bank by J. E. Manlove and used in the business of the Manlove Wool and Fur House during the latter part of 1901 and the first part of 1902.

Appellee, at the time of the trial, was seventy-seven years of age and resided on his farm about four miles from Plymouth, in Schuyler county, where he had lived since he was a small boy. In connection with his farming business appellee for a number of years bought and shipped furs. He had, however, retired from the fur trade several years before his son, Joseph E. Manlove, commenced trading in wool and furs under the name "The Manlove Wool and Fur House." The evidence tends to show that the appellee went out of the fur business some four or five years before Joseph E. Manlove commenced operations. For two seasons the son carried on his trading at his father's farm, where he then made his home. Then he moved his business to Bushnell, McDonough county, where the same was continued until in December, 1902, when he failed in business. His liabilities largely exceeded his assets. The balance due appellant's bank is something over \$14,000, for which this suit is brought. The appellant sued appellee and Joseph E. Manlove as partners doing business under the name "The Manlove Wool and Fur House."

It appears from the opinion of the Appellate Court on the first appeal, which is reported as *Manlove v. Metzger*, 124 Ill. App. 383, that on the first trial appellant based his right to recover against appellee on two grounds: (1) That appellee was, in fact, a partner; (2) if not a partner in fact, he had held himself out as a partner, so as to estop him, as against appellant, from denying the existence of the partnership. On the last trial the only issue submitted to the jury by the instructions was, did a partnership in fact exist between appellee and his son?

The assignments of error in respect to giving and refusing instructions and the admission and exclusion of evidence make it necessary to examine the facts to determine whether the case is one requiring strict accuracy in the ruling on the law points. Such examination of the evidence has been made, and without discussing the facts in detail we merely mention some of the conclusions which the undisputed evidence established.

It is not disputed that Joseph E. Manlove had exclusive control of the business of the Manlove Wool and Fur House, and signed all checks, drafts and letters in his own name; that the bank account was kept in the name of J. E. Manlove; that appellant applied to appellee to sign notes as surety for Joseph E. Manlove and that appellee refused; that appellee had an account in appellant's bank at the time of the collapse of the Manlove Wool and Fur House, which appellant permitted appellee to withdraw without objection and made no effort to have any part of such balance applied on the account sued on; that after Joseph E. Manlove disappeared and was supposed to be dead, appellant made out a claim against his estate and swore to the same as an individual account; that appellee never put any money into the Manlove Wool and Fur House and never drew out any; that appellee loaned Joseph E. Manlove money and always required security, which fact was known to appellant. There is no evidence tending to prove the existence

of an express partnership agreement. From these facts and circumstances it is difficult to see how the jury or the Appellate Court could have reached any other conclusion than that appellant had failed to establish the existence of a partnership in fact. We do not regard the case as a close one on the evidence.

Appellant's first and most serious contention is, that the court erred in giving instruction No. 1 on behalf of appellee. That instruction is as follows:

"If the jury believe, from the evidence, that any witness who has testified in this case has been successfully impeached, or that he has knowingly and willfully testified falsely to any material question of fact in the case, then the jury would be warranted in disregarding the testimony of such witness, except in so far as he has been corroborated by other and credible evidence in the case or by facts and circumstances in proof."

The instruction is, in substance, identical with one considered by this court in *Chicago City Railway Co. v. Ryan*, 225 Ill. 287, and it is subject to the same objections pointed out to it in that case. It was there held that such an instruction, given without any explanation of the meaning of the term "successfully impeached," was liable to be understood by the jury as applying to witnesses who had been contradicted by other witnesses, "and if they [the jury] considered witnesses who had been contradicted as having been impeached, the instruction would authorize them to disregard the uncorroborated testimony of witnesses who had been contradicted, even though they might not believe that such contradicted witnesses had willfully testified falsely as to any material matter or even though the contradiction may have been as to an immaterial matter." It was held, however, that giving the instruction would not necessarily require a reversal of the judgment, but whether it constituted reversible error depended upon whether it appeared, from a consideration of the whole record, that the

jury might have been misled and the opposite party prejudiced by it. Our investigation of this record convinces us that this is not a case so close on the evidence that the verdict of the jury might reasonably be said to have been influenced or determined by the instruction.

The appellant criticises instructions numbered 30 and 31 given for appellee. We do not think these instructions open to any serious objection when read in connection with the entire series.

Appellant next insists that the court erred in refusing to give instruction No. 14 at his request. The refused instruction is as follows:

"The court instructs the jury that if you believe, from the evidence, that William B. Manlove and J. E. Manlove were partners in the business of the Manlove Wool and Fur House, then it is not material on the question of the liability, if any, of the said William B. Manlove whether the plaintiff, Henry G. Metzger, did or did not know of the existence of such partnership, if such partnership existed, or whether or not the credit, if any, was extended by the plaintiff to J. E. Manlove alone. If you believe, from the evidence, that William B. Manlove and J. E. Manlove were partners in the said business, it is immaterial whether the plaintiff, Henry G. Metzger, knew they were partners or believed they were partners, or whether he had any knowledge or belief at all on the subject, so far as the liability of William B. Manlove is concerned."

While this instruction does not direct a verdict it is liable to mislead, in that it entirely omits to require the jury to find that the credit was given in a partnership matter or for something in which the parties had a community of interest. While the liability of a secret or dormant partner to third persons does not depend on the knowledge or belief of the creditor as to the existence of a partnership, still it is necessary, in order to charge one as a partner, that the credit should be given in a transaction within the

scope of the partnership affairs. Even if appellee was a partner, he would not be liable on the individual contracts of J. E. Manlove made in respect to his personal concerns.

Aside from the liability of the instruction to mislead in the respect pointed out, the court, at the appellant's request, gave instructions Nos. 3 and 8, which embody in more accurate language the hypothetical facts upon which appellee's liability depends. Instruction No. 3 is as follows:

"The court instructs the jury that the plaintiff is entitled to recover in this case if he has proved, by a preponderance of all the evidence, that he advanced and paid out the money sued for as charged in the bank book in the account of J. E. Manlove therein, and that these moneys were used in the business carried on in the name of J. E. Manlove or of the Manlove Wool and Fur House, and that during the time when these moneys were being so advanced and paid out and so used, if they were, the defendant William B. Manlove was a partner of the said J. E. Manlove or Joseph E. Manlove in the said business."

Instruction No. 8 contains, in somewhat different language, the same rule laid down in No. 3, preceded by a statement that the fact that the account was kept in the name of J. E. Manlove on the bank books did not preclude appellant from showing, if he could, that appellee was, in fact, a partner and jointly liable with J. E. Manlove. With these instructions in the hands of the jury, both of which assumed to state the facts, and all of the facts, essential to a recovery, it was unnecessary to give instruction No. 14, which merely recited certain facts other than those contained in instructions Nos. 3 and 8, and told the jury that proof of those facts was not necessary to the right of recovery. The omission of such facts from the instructions which recited all the facts appellant was required to prove, was, in effect, an instruction that any fact not therein recited was not essential to the right of recovery. There was no error in refusing this instruction.

Appellant insists that the trial court erred in striking out the evidence of certain witnesses who testified that after J. E. Manlove disappeared appellee said he intended to pay appellant's claim, or that he had promised to pay it. To meet any claim that appellant might seek to establish, based on the promise of appellee after the debt was incurred, appellee interposed the plea of the Statute of Frauds, to which appellant demurred specially, reciting in his demurrer that "the declaration counts upon the joint promise of the two defendants, William B. Manlove and Joseph E. Manlove, and the plaintiff cannot recover without proving their joint liability, and any evidence tending to show no joint liability can be availed of by William B. Manlove without this plea." The court sustained the demurrer and the plea of the statute was eliminated from the trial.

The court did not err in striking out evidence which only tended to prove an individual liability. Such evidence was not responsive to the issues. But there is another reason why this ruling ought not to reverse the judgment. On page 8 of the abstract we notice that when appellant was on the stand in his own behalf he testified that two or three days after J. E. Manlove left, appellee came into his bank and said "I wouldn't lose a dollar by it;" "he said he was going to pay it all himself." This evidence was not stricken out nor was it denied by appellee. If the facts to which the evidence stricken out related had been relevant they were thus in the record. Appellant does not, however, pretend that he has a right to recover on the theory of appellee's promise made after the debt was incurred.

Appellant insists that the court erred in excluding certain evidence offered. The evidence to which objections were sustained mainly concerned the belief of appellant as to the existence of the partnership, and certain alleged statements made by J. E. Manlove to persons other than appellant to the effect that appellee was a partner. Neither the belief of appellant nor the statements of J. E. Manlove

were pertinent to the issues involved. There was no error in excluding this evidence. The same observation is applicable to the other evidence excluded.

We find no error in the record which would warrant us in reversing this judgment. The judgment of the Appellate Court for the Third District is affirmed.

Judgment affirmed.

MARY CALLERAND *et al.* Defendants in Error, *vs.* BAPTISTE PIOT *et al.* Plaintiffs in Error.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. *DEEDS—what is a sufficient delivery to pass title.* Deeds executed contemporaneously with a will which refers to the deeds as having been executed to the grantor's sons and delivered to a notary to be delivered to the sons at the grantor's death, and which are accepted by the grantees when manual possession is given to them by the notary after the grantor's death, are well delivered and pass title, where there is nothing to show the grantor intended to retain any control over the deeds after delivering them to the notary, though he kept possession of the lands until his death.

2. *SAME—what does not tend to show that grantor intended to retain control over deeds.* Proof that the grantor, at the time he executed a will and certain deeds to his sons, destroyed an earlier will and similar deeds which he had left in the possession of the notary who drew them, does not indicate that the grantor intended to retain control over the second deeds, which he left with the notary to be delivered to the grantees at the grantor's death, there being no proof as to what arrangement was made with the notary when the earlier deeds were left in his possession.

3. *SAME—what declaration by grantor is not inconsistent with delivery of deeds to third person.* The fact that the grantor, after executing certain deeds to his sons and delivering them to the notary who drew them, to be delivered to the grantees at the grantor's death, made the statement, "None of my folks shall have any of my property while I live; I am going to be boss," is not inconsistent with the theory that the grantor had parted with all control over the deeds, since the grantees could exercise no acts of ownership over the property until they received their deeds after the grantor's death.

4. SAME—*fact that the notary would have given deeds back to grantor is not material.* The fact that the notary to whom deeds were delivered by the grantor to be delivered to the grantees at the grantor's death, testifies that he would have given the deeds back to the grantor if he had wanted them, as he felt that the grantor had a right to control his property, shows merely the view of the witness, and does not tend to show the grantor did not intend to part with all control over the deeds.

WRIT OF ERROR to the Circuit Court of St. Clair county;
the Hon. CHARLES T. MOORE, Judge, presiding.

On April 7, 1908, Mary Callerand and Josephine Boisseau filed their bill in the circuit court of St. Clair county against Baptiste Piot, Emile Piot and others for the partition of certain lands in that county of which John Baptiste Piot was alleged to have been the owner at the time of his death, and to have certain deeds executed by the deceased purporting to convey said lands canceled and set aside as clouds upon the title thereto. The lands of which partition was sought were the lands which were apparently conveyed by the deeds attacked by the bill. Answers and replications were filed and the cause was referred to a master to take the testimony and report the same to the court. Upon a hearing on that report the court entered a decree granting the prayer of the bill, and to review that decree Baptiste Piot and Emile Piot have sued out a writ of error from this court.

John Baptiste Piot died at East St. Louis, Illinois, on September 24, 1907, leaving a will, in and by which he disposed of all his property, unless the land involved in this suit should be determined to be intestate property not conveyed by the deeds above mentioned. He left surviving him as his only heirs, Mary Callerand, Josephine Boisseau and Justine Ward, his daughters; Baptiste Piot and Emile Piot, his sons, and Adele Renard, a grandchild. The will was executed by the deceased at the office of Prosper J. Soucy, a notary public in the city of East St. Louis, on

March 28, 1907, and at the same time Mr. Piot executed two deeds, one conveying lot 220 of the common fields of Cahokia, in St. Clair county, to Baptiste Piot, and the other conveying lot 210 of the common fields of Cahokia, and an additional tract of about ten acres, to Emile Piot. Each deed recited a consideration of one dollar and love and affection. The deed to Baptiste Piot contained the following statement: "This being the same land bequeathed by me to my son Baptiste Piot in my last will and testament." The deed to Emile Piot contained the same statement as to him. Each deed was an ordinary warranty deed, containing no reservation. The third and fourth clauses of the will executed by the deceased are as follows:

*"Third—*To my son Baptiste Piot I have executed deed and delivered same to P. J. Soucy, of East St. Louis, to be delivered to him upon my death, for the following described property, to-wit: Lot numbered two hundred and twenty (220) of the common fields of Cahokia.

*"Fourth—*To my son Emile Piot I have executed deed and delivered same to P. J. Soucy, of East St. Louis, to be delivered to him upon my death, for the following described property, to-wit: Lot two hundred and ten (210) of the common fields of Cahokia, and other lands, description of which is contained in said above mentioned deed."

No other language is found in the will regarding any disposition of lands mentioned in the clauses above set out.

When the will and deeds had been executed by Mr. Piot he gave them to Mr. Soucy, who had prepared the instruments, and instructed him to destroy a will previously executed by him and two deeds which he had theretofore executed conveying the same lands to Baptiste and Emile Piot, all of which were then in Mr. Soucy's custody, and asked him to take charge of the instruments just executed and after his death to file the will for probate and deliver the deeds to his sons, Baptiste and Emile Piot. These instructions were all carried out by the notary, the will and

deeds last executed remaining in his office, without the grantees knowing of their execution, until a few days after Mr. Piot's death, when the grantees were notified to come and get them. Pursuant to that notification they called at the office and each received and accepted the deed in which he was named as grantee. Later the will was admitted to probate and the deeds were filed for record. Up until the time of his death Mr. Piot retained possession and control of the lands.

The decree of the circuit court was rendered on the theory there was no sufficient delivery of the deeds by Mr. Piot and that he died intestate as to the lands described in them.

It is contended by plaintiffs in error that the delivery was sufficient and that the deeds convey the title.

H. E. SCHAUMLOEFFEL, and WISE, McNULTY & KEEFE, for plaintiffs in error:

Where a grantor signs a deed and places it in the hands of a third party, with directions to deliver such deed, at the death of the grantor, to the grantee in such deed, and such third party takes such deed and retains possession of it until the grantor's death and then delivers it to the grantee, who takes such deed and files it for record, the grantee acquires good title to the land by such deed. *Latimer v. Latimer*, 174 Ill. 418; *Baker v. Baker*, 159 id. 396; *Crabtree v. Crabtree*, 159 id. 348; *Shea v. Murphy*, 164 id. 614; *Miller v. Meers*, 155 id. 284; *Thompson v. Calhoun*, 216 id. 162.

While there must be a delivery of a deed by the grantor in his lifetime, it is not necessary that he should deliver it to the grantee. It is sufficient if he deliver it to a third person for the grantee, and such person can make a valid delivery of it to the grantee after grantor's death. *Stone v. Duvall*, 77 Ill. 475; 13 Cyc. 564; *Morrison v. Kelly*, 22 Ill. 610; *Crocker v. Lowenthal*, 83 id. 579; *Rodemeier v. Brown*, 169 id. 347.

The law makes stronger presumptions in favor of delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale. The presumption is in favor of the delivery, and the burden of proof to show there was no delivery rests upon the party attacking the conveyance. *Valter v. Blavka*, 195 Ill. 615; *Crabtree v. Crabtree*, 159 id. 348.

Anything which clearly manifests the intention of the grantor and the person to whom it is delivered, that the deed shall become operative and effectual and that the grantor loses all control over it and that by it the grantee is to become possessor of the estate, constitutes a sufficient delivery. The very essence of delivery is the intention of the party. *Crabtree v. Crabtree*, 159 Ill. 348; *Winterbottom v. Pattison*, 152 id. 334; *Gunnell v. Cockerill*, 84 id. 319; *Bovee v. Hinde*, 135 id. 157; *Kline v. Jones*, 111 id. 563; *Oliver v. Oliver*, 149 id. 542.

The complainants had the burden of proving that their ancestor died intestate as to the property described in the deeds, and had the burden of proving that there was no sufficient delivery of the deeds. 2 Ency. of Evidence, 777; *Scott v. Wood*, 81 Cal. 398; *Pease v. Cole*, 52 Conn. 53; *Funk v. Proctor*, 22 Ky. L. 1728.

In order for one to sustain his right to an action for partition he must show a clear title to the undivided interest or share of land sought to be partitioned. 9 Ency. of Evidence, 526; *Harmon v. Kelly*, 14 Ohio, 512; *Ross v. Cobb*, 48 Ill. 111.

J. M. FREELS, and R. H. FLANNIGAN, for defendants in error:

A recital in a will referring to certain property as having been theretofore deeded, the deed of which is invalid for want of delivery, cannot be given the effect of a devise. Nor does the recital aid in establishing that there was a valid delivery of the deed so as to make it operative.

Nor can a recital in the deed that the grantor had bequeathed the property by will make or aid a devise by will, when there is no such devise, or attempted devise or bequest, in such will. *Noble v. Tipton*, 219 Ill. 182; *Lange v. Cullinan*, 205 id. 365; *Hunt v. Evans*, 134 id. 496; *Lander v. Lander*, 217 id. 295; *Stodder v. Hoffman*, 158 id. 489; *Oswald v. Caldwell*, 225 id. 224; Underhill on Wills, sec. 475; Page on Wills, sec. 468.

A delivery is essential to the validity of a deed, and to constitute a delivery the grantor must part with all control over it and retain no right to reclaim or recall it. *Noble v. Tipton*, 219 Ill. 186.

The delivery is an essential part of the execution of the deed, and it will only become operative by and take effect from its delivery. Without delivery it is void. *Hawes v. Hawes*, 177 Ill. 413.

To constitute the delivery of a deed it must clearly appear that it was the intention of the grantor that the deed pass the title at the time and that he should lose all control over it. A deed for an interest in land must take effect upon its execution and delivery, or not at all. *Wilson v. Wilson*, 158 Ill. 574; *Elliott v. Murray*, 225 id. 112; *Benner v. Bailey*, 234 id. 81; *Russell v. Mitchell*, 223 id. 444.

An acceptance of the deed by the grantee is essential to the legal operation of the deed. Without such acceptance there is no delivery. *Gillen v. Gillen*, 238 Ill. 218; *Brown v. Brown*, 167 id. 636; *Abrams v. Beale*, 224 id. 499; *Dagley v. Black*, 197 id. 59; *Moore v. Flynn*, 135 id. 79; *Wilenou v. Handlon*, 207 id. 112; *Barrows v. Barrows*, 138 id. 654; *Lange v. Cullinan*, 205 id. 369; *Osborne v. Eslinger*, 155 Ind. 360.

The deeds in question were not intended to take effect in the lifetime of the grantor and are testamentary in character, and being in the form of plain warranty deeds they cannot be sustained as a testamentary disposition of property. *Noble v. Fickes*, 230 Ill. 601.

If the intended disposition of property is of a testamentary character and not to take effect in the testator's lifetime but is ambulatory until his death, such disposition is not operative unless it be declared in writing, in strict conformity with the statutory enactments regulating the making of wills. *Oswald v. Caldwell*, 225 Ill. 231; *Benner v. Bailey*, 234 id. 82; *Gump v. Gowans*, 226 id. 635.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The grantees were sons of the grantor. They accepted the deeds when they received manual possession of them after the father's death. He executed the deeds and his will at the same time. At that time he left the deeds and the will with Prosper J. Soucy, the notary public who had drawn them, and who testified: "When Mr. Piot delivered the will and the deeds to me he said he wanted me to keep them until his death and I should see that the will was spread of record and the deeds delivered to the boys; I was not to deliver the deeds until after his death; I kept them in my safe until after he died." This testimony, in so far as it shows Mr. Piot's purpose, finds strong corroboration in language of the will. The grantor never saw the deeds again and never thereafter attempted to exercise any control over them. Under these circumstances the deeds are effectual to convey title, (*Thompson v. Calhoun*, 216 Ill. 161, and cases there cited,) unless there is in the record proof which shows that the grantor, at the time he left the deeds with Mr. Soucy, had some intention other than that manifested by his acts and directions which have just been mentioned.

Defendants in error call attention to several matters in evidence which they regard as showing the grantor's intention to retain control and dominion over these deeds up until the time of his death. In considering these matters we pass over any question in regard to the competency of the proof, as no objection of that character has been urged

by plaintiffs in error. The record shows that the grantor several times, both before and after the execution of these deeds though not on the day on which they were executed, said to persons other than Mr. Soucy, "None of my folks shall have any of my property while I live; I am going to be boss." Such a statement is not inconsistent with the theory that the grantor reserved no control over the deeds after leaving them with the notary, for the reason that the sons could exercise no acts of ownership under the deeds until they received them, which was not to be until after the father's death. Prior to the time when he made this will and these deeds he had executed two wills, which had been drawn by Mr. Soucy. On the occasion of the execution of each of the earlier wills he also executed deeds to these two sons and at both of those times left the deeds and the will with Mr. Soucy. Afterwards he again took possession of the will and the deeds executed on each of the earlier occasions and destroyed them or had them destroyed, or otherwise made such disposition of them as that they no longer remained in the notary's possession. It is insisted that this is a circumstance which indicates that he reserved control over the deeds involved in this suit. The record does not disclose anything at all in regard to what was said by him to Mr. Soucy, or what arrangement was made between them on either occasion when earlier deeds were executed and left in the possession of the notary. The testimony as to the earlier transactions, therefore, is without significance in determining with what intention the last deeds were left with the notary.

Mr. Soucy testified in reference to the last two deeds: "If Piot had called for these deeds after he had delivered them to me and wanted them I certainly would have delivered them to him; I felt he had a right to control his property,"—and this is said to show that the grantor reserved control of the instruments. It shows rather the view of the witness in regard to the effect of the directions given him

by Mr. Piot. That testimony is not of assistance in determining the intention evidenced by the language used by the grantor. We think it clear that when the grantor delivered these deeds to the notary he parted with all control over them.

The decree of the circuit court will be reversed and the cause will be remanded, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

FREDERICK HORNUNG, Defendant in Error, vs. THE DECATUR RAILWAY AND LIGHT COMPANY, Plaintiff in Error.

Opinion filed June 16, 1909—Rehearing denied October 12, 1909.

INSTRUCTIONS—*when instructions do not improperly limit time for using due care.* In an action for injuries received from defendant's street car when plaintiff was driving across the track, instructions advising the jury that it was sufficient if the plaintiff was in the exercise of due care "at the time of driving across" and "while driving across" defendant's tracks, do not, when reasonably construed, improperly limit the time when the plaintiff was required to be in the exercise of ordinary care for his safety.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macon county; the Hon. W. C. JOHNS, Judge, presiding.

At the January term, 1908, Frederick Hornung, defendant in error, recovered a judgment for the sum of \$1500 in the circuit court of Macon county against the Decatur Railway and Light Company, plaintiff in error, for personal injuries alleged to have been sustained by him through the negligence of said company. To review the judgment of the Appellate Court for the Third District affirming that

judgment the case has been brought to this court upon a writ of error.

The declaration, consisting of two counts, alleged that by reason of the negligent operation of a certain street car which was owned and operated by plaintiff in error in the city of Decatur it collided with a wagon in which defendant in error was riding, throwing him therefrom and causing him to be severely injured. The first count charged that the car was negligently operated at a high and dangerous rate of speed, and the second charged the motorman with a negligent failure to reduce the speed of the car when he saw that defendant in error was about to drive upon the track. The general issue was interposed. The only assignment of error here presented questions the action of the court in giving and refusing instructions.

HUGH CREA, and HUGH W. HOUSUM, for plaintiff in error.

ALBERT G. WEBBER, and CHARLES M. BORCHERS, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Hornung was driving south in Water street, on the west side of the single street car track in that street. As he proceeded south he came to a large moving van standing in the street on the west side of the track. In order to pass around this van it was necessary for him to drive upon the street car track. He testified that before driving upon the track he looked over his shoulder in a northerly direction to see if a car was approaching. He did not turn entirely around, but turned his head far enough to see north along the track about a block. Seeing no car coming within that distance he drove upon the track, and before he had passed off the track he was struck by a car coming from the north and injured. At the time when, as he testified, he looked over

his shoulder he could, had he turned entirely around, have seen the street car track for a distance of about a half mile to the north and could have seen any car that was approaching on that stretch of track at that time. It was contended by the railway company that even if he looked as he testified he did, it was at least a question for the jury whether he was guilty of contributory negligence in driving upon the track without looking farther north along the track than he testified he did look.

In this condition of the record the court, at the request of Hornung, gave to the jury, among others, plaintiff's instructions numbered 7 and 13. Each of these instructions directed a verdict. Upon the question of the exercise of due care the seventh advised the jury that it was sufficient if it appeared that the plaintiff was in the exercise of ordinary care "at the time of driving across the street car track of the defendant," and the thirteenth, if he was in the exercise of due care "while driving across the defendant's street car track." It is urged that both of these instructions improperly limited the time during which Hornung must have been in the exercise of ordinary care to the period during which he was actually driving across the track, while, as a matter of law, he was required to exercise due care for his personal safety just before driving upon the track. This objection would be meritorious if the quoted words were given their strict and literal signification, but we do not think the jury would attach to them such a meaning.

McNulta v. Lockridge, 137 Ill. 270, was a crossing accident case, in which a husband and wife were killed. Suits brought by their administrator were consolidated and tried together. An instruction given required the exercise of due care "at the time they were killed" and "at the time they attempted to cross the railroad track." It was objected that the time during which due care must have been exercised was thereby limited to the moment when the persons were killed and to the period during which they were in the act

of crossing the track. It will be observed that the last expression quoted is very much like those used in the case at bar. This court expressed the view that the jury could not reasonably have understood the instruction otherwise than as referring to the occasion on which the deceased persons attempted to cross the track and were killed. *Lake Shore and Michigan Southern Railway Co. v. Ouska*, 151 Ill. 232, grew out of another crossing accident. The instruction on this subject in that case required the exercise of reasonable care by the deceased "at the time of the injury," and it was held that these words did not restrict the exercise of due care to the moment of the injury, but that they had reference to the whole transaction, including all that occurred from the time the deceased reached the tracks until he was killed. That case has frequently been approved. (*Chicago and Alton Railroad Co. v. Harrington*, 192 Ill. 9; *St. Louis National Stock Yards v. Godfrey*, 198 id. 288; *Pittsburg, Cincinnati, Chicago and St. Louis Railway Co. v. Robson*, 204 id. 254.) We think the cases which we have cited show that the plaintiff in error's objection is not well taken. The cases relied upon by it, which were decided by this court, are distinguishable from the case at bar.

Complaint is also made of the action of the court in refusing the fifth and seventh instructions requested by the railway company. These instructions were both in reference to what the motorman had a right to expect on the part of Hornung prior to the time when Hornung turned toward the track, and in reference to his duty when he perceived that Hornung was about to pass upon the track. The propositions contained in these instructions were accurate, but we think they were covered by other instructions given at the request of plaintiff in error.

The record is free from reversible error. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

IRA S. POWELL, Appellant, *vs.* ROBERT W. HUEY, Appellee.—ROBERT W. HUEY, Appellee, *vs.* IRA S. POWELL *et al.* Appellants.—ROBERT W. HUEY, Appellee, *vs.* IRA S. POWELL *et al.* Appellants.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. MORTGAGES—*what is not a variance between averment and proof in foreclosure.* The fact that a foreclosure bill alleges a direct and absolute liability on the note and mortgage whereas the proof shows that the mortgage was not given to secure an existing debt but to protect the mortgagee in signing as security for the mortgagor does not constitute such a variance as precludes a foreclosure for the amount due.

2. SAME—*when a note is within security of mortgage.* A note signed by the mortgagor's son with the mortgagee as surety, on which the mortgagor received the money, is within the security of the mortgage, where it appears from a written agreement signed by the mortgagor, his son and the mortgagee, and from the other facts in evidence, that the mortgage was intended to cover loans made for the benefit of the mortgagor, whether the notes were signed by him and his son or by either of them.

3. CONTRACTS—*contract to convey by good and sufficient warranty deed requires a title without encumbrance.* A covenant in a contract for the sale of land that the vendor will convey by a good and sufficient warranty deed requires the conveyance of a title free from encumbrance, and, in the absence of any agreement to the contrary, the vendor cannot demand specific performance if he is unable to fulfill such covenant, even though the vendee denies the execution and binding force of the contract when refusing to accept a title subject to an encumbrance.

4. PRACTICE—*when an appeal from specific performance decree lies to Supreme Court.* An appeal from a decree dismissing a bill for specific performance of a contract for the sale of land should be taken directly to the Supreme Court and not to the Appellate Court, where the making of the contract and the right of the vendor to compel the vendee to accept a conveyance of his title are contested.

APPEALS from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding.

On October 6, 1906, Robert W. Huey sued Ira S. Powell and William A. Powell in the circuit court of Hancock county in an action of assumpsit. On January 21, 1907, he filed a bill against the same parties and Martha M. Powell, wife of William A. Powell, for the foreclosure of a mortgage. On March 2, 1907, Ira S. Powell filed a bill against Robert W. Huey for the specific performance of a contract of sale of real estate. The suits all involved the same transactions, and a jury having been waived in the common law suit, the cases were all submitted to the court for hearing at one time. The court rendered judgment in the action of assumpsit against the defendants for \$2424, decreed a foreclosure of the mortgage for \$8483.61, and dismissed the bill for specific performance for want of equity. The judgment and decrees have been affirmed by the Appellate Court and the cases are now here as separate appeals. They were argued together and will be disposed of in one opinion.

Robert W. Huey and William A. Powell are brothers-in-law. On August 18, 1903, Huey, as surety, signed Powell's note to O. J. Talbot for \$800, due in one year. Powell owned two farms near Carthage, in Hancock county,—one of about ninety acres, on which he lived, and another of about one hundred and fifty acres, known as the Coke farm. On September 24, 1903, he mortgaged both these farms to Davis Brown for \$12,000, due in five years, and on the same day, expressly subject to said mortgage, he and his wife executed a second mortgage to Huey to secure their note of that date for \$7000, made payable to Huey five years after date, with five per cent interest, payable annually, as evidenced by interest notes. This mortgage was given only to protect Huey in signing as surety for Powell. After the giving of these mortgages, Ira S. Powell, who is the son of William A. Powell and Martha M. Powell, became of age, and they soon after conveyed both farms to him. Afterwards, on September 13, 1905, Huey borrowed

for one year \$5000 of the Union National Bank of Macomb on his own note but for William A. Powell, who received the money. Ira S. Powell and William A. Powell then gave their note to Huey for this amount, due in one year, and all three signed a statement certifying that the mortgage of September 24, 1903, was to be held by Huey as security on notes given to him by the Powells, and also for notes endorsed or signed by him with Ira S. Powell and William A. Powell, and that when all notes owed by them to Huey, and also the notes endorsed or signed by Huey with Ira S. and W. A. Powell, were paid and canceled, the mortgage and note were to be delivered to Ira S. Powell. On August 4, 1906, Huey signed as surety Ira S. Powell's note to the Hancock County National Bank for \$4541.37, due in ninety days, this being a renewal of other notes which had been running for six or nine months and on which William A. Powell had received the money.

At the beginning of September, 1906, the Talbot note for \$800 was past due, the \$5000 note to the Union National Bank would mature on the 13th, the interest on the \$12,000 mortgage would be due on the 24th, and the note for \$4541.37 to the Hancock County National Bank on November 2. In view of this situation William A. Powell proposed to Huey that Huey should buy the Coke farm, and on Monday, September 10, they went to Carthage, at Powell's suggestion, to make some arrangements about the matter. Sidney C. Powell accompanied them. What occurred at Carthage is the serious question of fact in the case. It is certain that the matter of the purchase of the Coke farm by Huey for \$18,750 (\$125 an acre) was discussed, and the question of how much money Huey could borrow on that farm and his own, and of how much would be left which Powell must provide for, was considered. Huey and William A. Powell went to the office of Charles H. Garnett, a lawyer, to see what Huey could do about borrowing the money, and Garnett went with Huey to an-

other office but no loan was made. The chief controversy in the testimony is over what took place in Charles H. Garnett's office. Huey testified that he and William A. Powell went, together with Sidney C. Powell, to Garnett's office in the forenoon, and while they were there Garnett prepared an application for a loan on the Coke farm and Huey's farm, which Huey signed; that he was in Garnett's office only once that day and signed only one paper, which was represented to him to be an application for a loan; that the day was dark and he could not read the paper with his glasses, though he tried; that he did not agree to buy the farm and signed no contract to do so to his knowledge. William A. Powell, who was the moving and active party in the sale of the land, was not examined as a witness. Garnett testified that Sidney C. Powell did not come to Garnett's office with William A. Powell and Huey in the forenoon but that the latter two came alone; that Powell told him that Huey had bought the Coke place and wanted to see him about borrowing some money; that he told them he was not making loans but went with Huey to Mr. Kelly's office, and that before leaving his office, or after they got on the street, one of them said a contract should be prepared for the sale of the land, and he told them he could prepare it. Garnett and Sidney C. Powell both testified that in the afternoon the two Powells and Huey came to Garnett's office and that there a contract was prepared by Garnett for the sale of the Coke farm to Huey for \$18,750. The premises were to be conveyed to Huey by good and sufficient warranty deed on or before September 24, 1906, and possession was to be then delivered. The consideration was to be paid, in part, by the assumption of the Hancock County National Bank note and the remainder in cash on the delivery of the deed. They also testified that Huey signed this contract and that William A. Powell signed Ira S. Powell's name to it, and a contract so signed was produced at the hearing. They testified further that it was

agreed there that the remainder of the \$18,750, after the payment of the note for \$4541.37, was to be paid by Huey's paying the Talbot note and the \$5000 Union National Bank note and by his assuming so much of the \$12,000 mortgage as the remainder of the purchase money would amount to.

On September 12 Ira S. Powell in person signed the contract which had been left with Garnett, and on the 24th Garnett tendered to Huey a warranty deed of the Coke farm, which had been executed by Ira S. Powell. Huey said that he had never told Ira to make him a deed and did not want to take it. Huey paid the Union National Bank note, amounting to \$5300, on September 24, and the Hancock County National Bank note of \$4541.37 at maturity, and the Talbot note.

DAVID E. MACK, WILLIAM H. HARTZELL, JOHN W. WILLIAMS, and JOHN D. MILLER, for appellants.

CHARLES J. SCOFIELD, and APOLLOS W. O'HARRA, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The evidence was in direct conflict as to whether the contract bearing Huey's signature was knowingly executed by him or he was deceived into signing it, believing it to be an application for a loan. The circumstances, aside from the testimony of the three witnesses who testified directly on the subject, which were relied upon by either side as corroborative of their respective contentions, were consistent with either view. The evidence was heard in open court, and under such circumstances the findings of fact by the chancellor will not be disturbed unless it is clearly apparent that they are wrong. (*Amos v. American Trust and Savings Bank*, 221 Ill. 100; *Heyman v. Heyman*, 210 id. 524.) It is not necessary, however, to determine the question, because, even if it be conceded that a binding

contract was entered into, the judgment and decrees of the circuit court will not be affected thereby.

The contract required Ira S. Powell to convey to Huey by a good and sufficient warranty deed. Such a covenant required the conveyance of a title free of encumbrance. (*McCord v. Massey*, 155 Ill. 123; *Morgan v. Smith*, 11 id. 194; *Brown v. Cannon*, 5 Gilm. 174.) On the day appointed for the delivery of the deed the land was encumbered by the Brown mortgage of \$12,000 and the \$7000 mortgage to Huey. There is no question that the latter mortgage stood as security for the Talbot note and the \$5000 note. These encumbrances, with interest, amounted to \$18,748. The purchase money, after deducting the Hancock County National Bank note, amounted only to \$14,208.63, leaving a difference of more than \$4500 still a lien on the premises. The bill for specific performance alleged, as it was necessary that it should, that complainant had always been ready and willing to perform his part of the agreement on being paid the remainder of the purchase money and to deliver the deed to Huey and to let him into possession of the premises, but no evidence was offered of Ira S. Powell's ability to convey the title agreed to be conveyed. On the contrary, it is to be inferred that he could not do so. The \$12,000 mortgage was not due until 1908. It is true that the privilege existed of paying it on September 24, 1906 or 1907, but Ira S. Powell had not the money with which to pay it, so far as this record shows. William A. Powell, with Huey, had applied to Fred Churchill, who represented the owner of the mortgage, to see if he could arrange to carry \$4500 of the amount on the home place of ninety acres, and Mr. Churchill told them he thought he could do so, but later found that he could not furnish the money and told them he would have to let the loan stand as it was or they could take it up at interest-paying time. No further effort appears to have been made to remove the encumbrance. At any rate it was not re-

moved and the record contains no indication that it could be removed. The complainant, being himself unable to perform, was not in a position to compel performance.

It is, however, contended that Huey repudiated the contract and thereby put an end to the necessity of any further performance by Powell. The only evidence of any effort at performance by Powell after Churchill refused to divide the Brown mortgage is that he executed a deed and had Garnett tender it to Huey. Huey declined to receive it, and in response to Garnett's statement, "You bought the farm or contracted to buy it," said: "Well, I have no doubt you understood that from what I said; no doubt you thought so, but there are things to it you don't know; there is more about the transaction you don't know." This is all the record contains as to what took place on that occasion, and it certainly indicated no waiver of anything on Huey's part. This occurrence furnishes no excuse for anything less than full performance on the part of Powell, if he desired to enforce performance on the part of Huey. His contract required the conveyance of a title free from encumbrance, and even if Huey had denied the execution of the contract and its binding force upon him, this would not authorize the court to force upon him a title subject to an encumbrance for \$4500.

It is further insisted that the agreement nowhere shows that the Davis Brown mortgage was to be actually divided; that it could have been carried as a mortgage on the two farms, Powell and Huey each providing for his proportionate share of the debt. The written contract required the Coke farm to be conveyed to Huey free from encumbrance. If the parol evidence is to be considered, Garnett testified that Huey was to pay the three notes for \$800, \$5000 and \$4541.37, respectively, and for the balance of the purchase money was to assume so much of the Davis Brown mortgage; that his part was expected to be independent of Powell's and to be on the Coke farm, while Powell would

have \$4500 on his farm; that the understanding was that the entire mortgage was to be paid, and Powell was to give a new mortgage for \$4500 on his farm and Huey was to borrow the full \$18,750 on the Coke farm and his home farm. Sidney Powell testified that Ira was to take care of the balance of the \$12,000 mortgage; that they were to see if Churchill could divide it, and if not, they were to pay it off. There is, therefore, no evidence that it was agreed that any part of the \$12,000 mortgage should remain against the Coke farm or that any modification of the written agreement was made in this respect.

The question of the right to the specific performance of the contract is considered only because of its bearing on the foreclosure and assumpsit cases. The decree dismissing the bill for specific performance is not properly before us. The making of the contract and the right of the vendor to compel the vendee to accept a conveyance of his title are contested. A freehold was involved in that decree and the appeal from it was improperly taken to the Appellate Court.

In regard to the foreclosure case, it is insisted that the proofs do not correspond with the allegations of the bill. The bill alleged the existence of a debt of \$7000, the execution of the note and mortgage and default in the payment of interest, in the usual form. The proof showed that the mortgage was not given to secure an existing debt but for the purpose of protecting the mortgagee in signing as security for William A. Powell. The bill alleges a direct and absolute liability on the note and mortgage. The proofs show a collateral and indirect liability. This same question of variance arose in the case of *Collins v. Carlile*, 13 Ill. 254, where a bill was filed in the usual form to foreclose a mortgage given to secure a note for \$500. In reality the mortgage was given to secure the price of goods to be thereafter sold, and goods were thereafter sold at various times to the amount of more than \$2000. Payments

made from time to time reduced the indebtedness to \$400. The bill having been dismissed upon a hearing, the decree was reversed, the court saying (p. 260): "Another objection to a recovery in this case has been raised, which is, that the bill being in the ordinary form of bills to foreclose, without setting forth the real consideration of the mortgage, the complainants must fail in this suit for the reason that the allegations and the proofs do not correspond. The bill shows a case in which the complainants would clearly be entitled to a decree. It was not necessary to set forth the consideration of the \$500 note, because, *prima facie*, it imported a good and sufficient consideration. This was all that was requisite, in the first instance, on the part of the complainants. The defendants come in and inquire into the consideration of the note, which they had a right to do. The proof shows that the complainants are not entitled to a decree for the full amount claimed. It is surely no objection to their having a decree for what is due because they have claimed too much; and it is immaterial what the consideration of the note was, so it was good and valuable. The recovery is at last upon the mortgage as set forth in the bill, though the extent is limited by the facts disclosed by the testimony. The evidence does not show a different case from that stated in the bill, but it brings into the case facts not stated and not necessary to be stated in complainants' bill to entitle them to a decree. There is not, in our opinion, such a variance between the allegations and proofs as to prevent a decree of foreclosure in this suit."

The further objection is made that the mortgage was not due. By its express terms the mortgagee was entitled to elect to declare the principal due, three of the annual interest notes being past due and unpaid when the bill was filed. He had paid about \$10,000 of the indebtedness against which it was intended to indemnify him. The amount of the past due interest was therefore due, and not

having been paid, the mortgagee might rightfully exercise his option to declare the whole amount secured by the mortgage due.

It is contended that the note for \$4541.37 to the Hancock County National Bank was not secured by the mortgage because it is not signed by Huey with Ira S. and W. A. Powell, but with Ira alone. This note was a renewal of previous notes, and the debt arose after the execution of the agreement between William A. Powell, Ira S. Powell and Huey, dated September 13, 1905. The note was signed by Ira S. Powell and Huey and the money which it represented was received by William A. Powell. The agreement referred to is as follows:

"MACOMB, ILL., Sept. 13, 1905.

"This is to certify that William A. Powell and Martha M. Powell have given Robert W. Huey a note and mortgage of \$7000, dated September 24, 1903, to be held by said Robert W. Huey as security on notes given to him by Ira S. Powell and William A. Powell and also for notes endorsed or signed by him with Ira S. Powell and William A. Powell. It is agreed that when all the notes owed by W. A. or Ira S. Powell, or both of them, to Robert W. Huey, and also the notes endorsed or signed by Robert W. Huey with Ira S. and W. A. Powell, are paid and canceled, then this mortgage and note are to be delivered to Ira S. Powell.

R. W. HUEY,

I. S. POWELL,

W. A. POWELL."

This writing was made for the purpose of extending to the \$5000 note executed the same day, the benefit of the security of the mortgage. It is manifest that it was also intended to apply to future transactions. So far as appears, Ira S. Powell never had anything to do with the management of the farms or with any financial transactions except in connection with his father. The relations of the parties, their methods of doing business and the nature of their transactions make it evident that whether such transactions were in the name of William A. Powell or Ira S. Powell, they were for the benefit of William A. Powell.

The name of Ira S. Powell was inserted in the writing because the title to the land had been placed in him, and the writing was intended to extend to notes endorsed or signed by Huey with either of them.

No defense was shown to the assumpsit suit, and the judgments of the Appellate Court affirming the judgment in that case and the decree in the foreclosure suit will be affirmed. The judgment of the Appellate Court in the specific performance case will be reversed and the cause remanded to that court, with directions to order the appeal transferred to this court.

Reversed in part and remanded, with directions.

ARTHUR W. MCGOVNEY, Appellant, vs. THE VILLAGE OF
MELROSE PARK, Appellee.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. APPEALS AND ERRORS—*Appellate Court's finding on a mixed question of law and fact is conclusive.* A finding of facts by the Appellate Court in its judgment is conclusive upon the Supreme Court even though some of the facts found involve the consideration of mixed questions of law and fact.

2. SAME—*what findings by the Appellate Court are conclusive.* Findings by the Appellate Court, in a judgment reversing a judgment against a village for legal services, that the plaintiff was appointed attorney for the village, that the services for which the recovery was had were services the performance of which was incumbent upon him and within the sphere of his duties as village attorney, and that at the time of his appointment and during all the time of his service there was an ordinance in force fixing the plaintiff's salary as village attorney, are conclusive upon the Supreme Court of the matters recited.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. D. T. SMILEY, Judge, presiding.

JOHN H. BATTEN, and CHAUNCEY M. MILLAR, for appellant.

F. J. GRIFFEN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellant recovered against appellee, on a trial before a jury in the county court of Cook county, a verdict and judgment for \$600, under the common counts, for services claimed to have been performed by him as attorney for said village. The Appellate Court for the First District, on appeal, reversed that judgment with the following finding of facts: "And the court, upon the allegations and proofs in the record in this cause contained, doth find that Arthur W. McGovney, the appellee, was appointed May 9, 1904, by the board of trustees of the appellant, the village of Melrose Park, village attorney of said village, and that he served as such village attorney from the time of his said appointment until May 1, 1905, and that all the services for the performance of which he claims compensation and sues were services the performance of which was incumbent on him and within the sphere of his duties as village attorney; also that when appellee was appointed village attorney, and during all the time he served as such, as aforesaid, there was an ordinance of said village in force by which the salary of village attorney was fixed at the sum of \$450 per annum." A certificate of importance was granted by that court, and this further appeal has been prosecuted.

An ordinance was passed June 11, 1900, by the proper authorities of appellee, creating the office of village attorney, providing for the appointment of such officer annually and prescribing his duties. Section 8 of that ordinance is as follows: "The compensation of such village attorney shall be and is hereby fixed at the sum of \$450 per annum: *Provided*, that in all special tax or assessment cases carried into courts of record, and in all cases in the State courts of

record and the courts of the United States in which the village may be a party plaintiff or defendant, such village attorney shall be allowed the usual and customary fees of attorneys practicing in such courts, over and above and besides such sum herein fixed and determined as and for his salary." Appellant claims for services performed by him for appellee by special agreement, but there was no entry in the proceedings of the village board showing such employment, although there was a record of his appointment as village attorney under said ordinance. We do not think, as contended by appellant, there was any conflict between this ordinance and the statute as to the manner of appointment of village attorney.

It is insisted by appellant that the finding of facts by the Appellate Court includes legal conclusions, and that therefore this court is not bound by such finding, citing *Hogan v. Chicago and Alton Railroad Co.* 202 Ill. 206, and *Martin v. Martin*, 202 id. 382. It may be true that the finding of ultimate facts by the Appellate Court includes conclusions, and that to reach these conclusions required the application of legal principles by that court; but the most that can be said in favor of appellant's contention is, that the questions whether he was appointed as village attorney, whether all the services were within the sphere of his duties as village attorney and whether the ordinance in question was in force were mixed questions of law and fact, and the findings of the Appellate Court on questions of that character are conclusive on this court and may not be reviewed here. (*Moerschbaecher v. Royal League*, 188 Ill. 9; *Roemheld v. City of Chicago*, 231 id. 467.) This being so, it is unnecessary for us to consider or decide the other questions raised in the briefs.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

HENRY H. PORTER, Appellant, *vs.* ARMOUR & Co. *et al.*
Appellees.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. INJUNCTION—*equity will not assume jurisdiction to restore party to possession of land.* A land owner has a complete and adequate remedy at law to determine the questions of his title and right to the possession of the land, and it is only in cases where the power of a court of equity has been invoked for some legitimate purpose of its jurisdiction incidental to the main object of the bill that such court will determine the right of possession between a party claiming that right and one holding adversely.

2. SAME—*when allegation of possession is essential.* A bill to enjoin the defendants from maintaining an elevated structure used as a runway for live stock over premises described as a private street cannot be maintained, where there are no allegations in the bill showing that complainant is in possession of the premises described or that he has any rights therein as an abutting owner. (*Burrall v. American Tel. Co.* 224 Ill. 266, and *Spalding v. M. & W. I. Ry. Co.* 225 id. 585, distinguished.)

3. SAME—*a bill need not show that complainant has not been guilty of laches.* A bill to enjoin the defendants from maintaining a structure over premises described as a private street need not aver the time when such structure was erected, in order to show, as a part of complainant's *prima facie* case, that he has not been guilty of unreasonable delay, since that matter is a defense to be raised by plea or answer, although it may be raised by demurrer if the delay appears on the face of the bill.

4. APPEALS AND ERRORS—*when a freehold is involved.* A freehold is involved upon appeal from a decree dismissing a bill for injunction after a demurrer has been sustained thereto, where the complainant, by his bill, claims to own the land described therein as a private street subject to certain easements, and seeks to enjoin an interference with his rights as the owner of such freehold interest.

APPEAL from the Circuit Court of Cook county; the
Hon. JULIAN W. MACK, Judge, presiding.

This is an appeal from a decree of the circuit court of Cook county sustaining special demurrers to and dismissing appellant's bill for an injunction.

Paragraph 1 of the amended bill alleges that in December, 1868, complainant and Martin L. Sykes and John F. Tracy became and were the owners in fee simple and were then seized and possessed of certain lands described in the bill. Paragraph 2 alleges that the complainant and said Sykes and Tracy, so being the owners of said land and so being seized and possessed thereof, subdivided a part of it as "Packers' addition to Chicago," "Packers' second addition to Chicago" and Packers' third addition to Chicago," and laid out and platted the same as in said paragraph described; that in said additions as laid out and platted there were reserved a private alley and two private streets. Paragraph 3 alleges that complainant and said Tracy and Sykes granted in express terms by deeds of conveyance to various persons, and to their heirs and assigns, the right to use and pass over said private ways to various other parcels of land described in said deeds of conveyance, but that the grantors in each of said deeds expressly reserved the right in themselves to use said private ways and the right to grant to any other person or persons the right to use them in common with the persons to whom said rights were granted in said deeds of conveyance, and that complainant and his co-owners had never granted to any person or persons any rights in said private alley and private streets, except the right to travel over, along and upon them. Paragraph 4 alleges the death of Tracy and Sykes, and that complainant had acquired, by purchase from their heirs, devisees, assigns and legal representatives, an undivided seven-twelfths interest in said private streets and private alley; that he has received deeds of conveyance therefor and is now the owner in fee simple of an undivided five-sixths interest therein; that he is also the owner in fee simple and is now seized and possessed of an undivided five-sixths interest in lots 3 and 4 and the west half of lot 2, in block 1, in Packers' second addition to Chicago. Paragraph 5 alleges that, in connection with the lots described in paragraph 4, com-

plainant desires and is entitled to the right to the free and unmolested use of said private streets and private alley for ingress to and egress from said lots. Said paragraph further alleges that the right remaining in the complainant to grant to other persons, in common with others to whom easements of passage had been previously granted, the right to use said private streets and alley for the purposes of travel remains a present and valuable right, which complainant and his co-owners may exercise as they see fit. Paragraph 6 alleges that, except for the easements of travel previously granted in said private streets and alley by complainant and his co-owners, complainant is entitled to the possession of said private streets and private alley; that he has retained the ownership thereof, with right to use and enjoy the same for all purposes which shall not obstruct the easements of passage theretofore granted, as set forth in the bill; that for his own use, and for the purpose of granting to any other person he may see fit a right to use said private ways, complainant has a right to have said premises kept free and clear of all encroachments and obstructions. Paragraph 7 alleges that the defendants (appellees here) have entered upon said premises platted as private streets and a private alley and erected a large structure of wood and iron over, along and across the same; that said structure consists of a large number of heavy posts placed in the ground of which the complainant is the owner in fee simple, supporting a viaduct or runway sixteen feet above the ground, which viaduct or runway is a two-story or double-decked structure built for part of its length of wood, having heavy floors and sides; that said structure is twenty-two feet wide, about forty feet in height and unsightly in appearance; that the posts of said structure physically occupy the surface of complainant's land and the structure obstructs and diminishes the light, view and air upon complainant's premises and forms a continuous and continuing obstruction to his lands and an invasion

of his rights; that defendants have within a year last past enlarged and increased the size of the said structure and changed the material of which it was built from wood to iron in many parts and caused it to be transformed from a temporary to a permanent structure; that defendants are maintaining the same as a runway, for the purpose of bringing cattle and sheep from the stock yards east of said premises to certain private plants of said defendants located westerly and south-westerly therefrom. Paragraph 8 alleges that defendants have not obtained any license or permission from complainant for the erection of said structure upon said premises, but without authority or license or pretense thereof, so far as complainant is informed, they have arbitrarily and willfully entered upon the said premises and erected said structure; that with full knowledge and notice of complainant's rights in the premises the said defendants have within a year last past caused said structure to be enlarged and the material thereof changed from wood to iron and are now maintaining the same without any pretense of right or license; that the posts or supports of said structure are imbedded in the ground and rest upon foundations also imbedded in the ground, so that it would be impossible for complainant to remove the structure without great difficulty and expense and without entering upon other premises not owned by complainant. Paragraph 9 alleges that defendants obtained no permission from complainant or his grantors for the erection or maintenance of said structure; that it was erected and has been maintained by said defendants without permission from him or his grantors and against complainant's protest and contrary to his wishes; that said structure constitutes an encroachment upon the premises and is a continuing trespass thereon. Paragraph 10 alleges that said structure is a damage and injury to complainant's said premises and diminishes the value thereof, and also diminishes the value of the lots described in paragraph 4, of which complainant is still the owner, and

the right remaining in complainant to grant to other persons the right to use said premises in common with persons already granted easements of passage thereon is diminished by said structure over, upon and across said premises, and that it is impossible for the complainant to obtain adequate damages for said continuing trespass and obstruction by an action at law; that he can only have adequate relief by the interposition of a court of equity. The prayer is that defendants, their officers, agents, attorneys and servants, be perpetually enjoined from unlawfully intruding upon complainant's premises and from maintaining or operating said structure upon or above complainant's said premises, and that upon a final hearing a mandatory injunction may issue, ordering and requiring the defendants to remove said structure forthwith from complainant's premises.

Defendants each demurred generally and specially to the bill. The general demurrers were overruled. Several causes of special demurrer were assigned, but the court overruled all of them except two. The decree recites: "And the court having considered the said several demurrers filed by the said defendants, it is ordered, adjudged and decreed that the said several special demurrers as to the following matters, to-wit: (1) The failure of complainant to allege the time when the said structures in said amended bill referred to were erected and how long the same had existed prior to the filing of the amended bill of complaint herein; and (2) the failure of the complainant to allege and set forth that the complainant was, at the time of the filing of the bill of complaint herein, in the possession of the said premises described as a private street, referred to in said bill of complaint,—be and the same are sustained to the said amended bill of complaint." Complainant elected to stand and abide by his bill, and a decree was thereupon entered dismissing the same at complainant's costs, and from that decree this appeal is prosecuted.

HENRY RUSSELL PLATT, HORACE KENT TENNEY, and
ROSWELL B. MASON, for appellant.

ALFRED R. URION, CHARLES J. FAULKNER, JR., JUDAH,
WILLARD, WOLF & REICHMANN, ALBERT H. & HENRY
VEEDER, and LOUIS C. EHLE, for appellees.

Mr. CHIEF JUSTICE FARMER delivered the opinion of
the court :

Appellees have entered a motion to dismiss the appeal
on the ground that no freehold is involved. If this were
true, it would not require a dismissal of the appeal but
would necessitate the case being transferred to the Appel-
late Court. Complainant in his bill claimed a freehold in-
terest in land, and the decision denying his right thereto
under his bill, and dismissing the same, was a denial of the
right asserted by him in his said bill, and we think involved
a freehold. The motion will therefore be denied.

It will be observed from the substance of the bill set
out in the statement preceding this opinion that there is no
avermment of the time when the structure complained of was
first erected and how long it has been continuously main-
tained and operated. Neither is there any averment that
complainant was at the time of filing the bill in possession
of the property. The chancellor held the bill to be defective
in both these respects and sustained special demurrers speci-
fying these grounds of objection.

Appellant insists that the allegations of the bill show,
and must be held to be, in effect, averments that complain-
ant was in possession. We do not so understand the lan-
guage of the bill. It avers that complainant and others
were in December, 1868, the owners and in possession of
the property of which the private streets and alleys are a
part; that subsequently the property was platted into three
additions, reserving the private streets and alley in contro-
versy; that afterwards complainant became the owner of

five-sixths of said property, and that, except for the easements of travel granted to other persons, complainant and his co-owners are entitled to the possession of said private streets and alley. It is true, the bill avers that complainant had reserved the right to grant easements of passage to other persons, and that defendants without any license or permission from complainant, and without any authority or pretense thereof, so far as complainant is informed, had erected the structure complained of on the property in controversy. We do not consider this an allegation, or the equivalent of an allegation, that complainant is in possession. Such an allegation is essential, in cases of this character, to the right to maintain the bill. The rule is, that courts of equity will not assume jurisdiction to determine disputes as to mere legal titles or the right to possession of real property. The owner of land has a complete and adequate remedy at law to determine his title and his right to possession, and he cannot invoke the aid of a court of equity, ordinarily, to restore him to possession of property he is the owner of where that possession has been invaded by another, but must resort to his action at law. It is only in cases where the power of a court of equity has been called into action for some legitimate purpose of its jurisdiction, incidental to the main object of the bill, that the court will determine the right to possession between a party claiming that right and one holding adversely. (*Green v. Spring*, 43 Ill. 280; *Daniel v. Green*, 42 id. 472; Story's Eq. Pl. sec. 476; Pomeroy's Eq. Jur. sec. 177; 16 Cyc. 52.) What is sought by complainant here is, in principle, analogous in this respect to a bill to remove cloud from title, and an allegation of complainant's possession is necessary to give a court of equity jurisdiction to entertain the bill. *Gage v. Abbott*, 99 Ill. 366; *Gage v. Ewing*, 114 id. 15; *Clay v. Hammond*, 199 id. 370; *Delaney v. O'Donnell*, 234 id. 109; *Lister v. Glos*, 236 id. 95.

Appellant contends that the allegations of the bill show he has the same character of possession that the complainants had in *Burrall v. American Telephone Co.* 224 Ill. 266, *Spalding v. Macomb and Western Illinois Railway Co.* 225 id. 585, and *Carpenter v. Capital Electric Co.* 178 id. 29. In the *Spalding case* the bill was filed by an abutting property owner for a mandatory injunction to compel the removal of a railroad from a street which the complainant alleged he owned the fee in, subject to the easement in the public for a street; and in the *Burrall case* the bill was filed by one who claimed to own the fee in land over which the public had an easement for a highway in which the defendant had erected telephone poles, with cross-arms, and strung wires thereon, without having first acquired the right to do so, by consent or otherwise. In these cases the possession of the complainants was not raised or discussed. But it is clear physical possession in such cases was impossible while the public easement existed, and in such cases courts of equity have jurisdiction to interfere at the suit of the owner of the fee, not to restore him to possession, but to prevent subjecting his fee to an additional servitude by one who acts without authority. In the *Carpenter case* the property in which an obstruction was placed was a private alley. The fee belonged to the complainant, an abutting property owner, and the alley was created for his use and the use of owners of adjoining property. It only extended part of the way through the block. The case was tried on its merits, and no question appears to have been raised as to the possession of the complainant or the sufficiency of the allegations of the bill with respect to that question. In the case now under consideration the property is alleged to be the property, in fee, of complainant. It is true, the bill alleges that complainant has granted to certain persons the right of passage over said property; but this would not, in law, divest him of possession if he was in possession of it. He would still retain such possession as was consistent

with the rights of passage granted to others. It may well be that the proof would not be required, in such cases, to show that no one else had any right of possession in connection with and subject to complainant's rights, but this would not obviate the necessity of an averment of possession. We do not understand appellant to contend that no averment of possession is necessary, but it is contended that, taking all the averments of the bill together, they sufficiently allege possession when the character and situation of the property are considered. It may be observed that it does not appear from the allegations of the bill that the two lots which the bill alleges appellant owns and is in possession of, abut upon the private ways in controversy, so that no question of the rights of an abutting property owner is presented. In our opinion it was vital that the bill should have alleged possession in appellant in order to give a court of equity jurisdiction to entertain it.

Appellees insist that the bill was obnoxious to special demurrer for the reason that it contained no averment as to the time when the structure complained of was erected and how long it had been maintained. This contention is based upon the theory that the time is essential in determining whether appellant is barred of his right to the relief, either by *laches* or by the Statute of Limitations. If it appeared upon the face of the bill that the appellant was barred for either of these reasons the bill would have been bad on demurrer. (*Schnell v. City of Rock Island*, 232 Ill. 89; *Kerfoot v. Billings*, 160 id. 563.) Here, the bill stating no time when the structure was erected, there is nothing upon the face of the pleading from which it appears appellant has been guilty of unreasonable delay in bringing his suit. In the *Spalding case* the precise question here involved was presented and it was contended that the complainant had been guilty of *laches*, and on this subject the court said, on page 592: "There is no specific allegation in this bill as to when this road was first operated. What

amounts to *laches* will depend upon the special facts and circumstances as shown in each case. The general rule in this jurisdiction is, that the defense of *laches*, to be availed of, must be set up by plea or answer, so as to afford the complainant an opportunity to amend the bill by inserting allegations accounting for the delay." The rule adopted in this State is, that where it does not appear upon the face of the bill that the complainant has unreasonably delayed the assertion of his right, the question whether it be *laches* or the Statute of Limitations must be raised by plea or answer. *Coryell v. Klehm*, 157 Ill. 462; *Dawson v. Vickery*, 150 id. 398; *Darst v. Murphy*, 119 id. 343.

Appellees contend that the demurrer on the ground that the bill failed to allege when the structure was placed upon the premises was properly sustained by the chancellor, not because the bill failed to show complainant was not guilty of unreasonable delay, but because the complainant was required to make such allegations as entitled him, *prima facie*, to the relief prayed, and to do this he was required to show by his bill that he had acted with reasonable promptness. This is, in effect, to say that a bill which does not show on its face unreasonable delay because there is no allegation of the time of the committing of the grievance complained of, stands upon the same basis as a bill which states the time, and shows, apparently, unreasonable delay, without giving reasons excusing it. This court has made the distinction that as to the first mentioned class of bills unreasonable delay of the complainant must be raised by plea or answer, while as to the latter class of bills the question may be raised by demurrer. In our opinion the bill in this case was not obnoxious to the special grounds of demurrer that it did not show on its face that complainant had not been guilty of unreasonable delay. That question could only properly be raised by plea or answer.

Appellees assigned numerous other grounds of special demurrer which the chancellor did not sustain, and they

have now assigned cross-errors on those rulings and ask that the decree be reversed and the cause remanded, with directions to the chancellor to sustain said special causes of demurrer and again enter a decree dismissing the bill. As the decree already entered dismissed the bill and as we affirm that decree on the grounds stated herein, we do not deem it necessary to go into an investigation and discussion of the cross-errors assigned, for the purpose of determining whether the court was right or wrong in passing on other grounds of special demurrer.

The decree of the circuit court is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* John J. Healy, Appellee, *vs.* EDWARD A. SHEDD *et al.* Appellants.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. PUBLIC POLICY—*courts cannot change the public policy of the State.* The public policy of a State is to be determined, in large measure, from its constitution and legislation, judicial decisions and the practice of the executive department, but when the legislature has acted upon a subject upon which it has power to legislate, public policy is what the statute passed by it indicates, and any change in such policy is for the legislature and not the courts.

2. CORPORATIONS—*limits of power of a corporation to hold real estate.* It is against the public policy of the State of Illinois, as evidenced by its statutes, judicially construed, for a corporation, either domestic or foreign, to hold real estate beyond what is necessary for the business or specific purposes of the corporation.

3. SAME—*corporation cannot be organized to acquire and hold real estate.* A corporation cannot be organized in Illinois for the purpose of acquiring and holding real estate, whether it is to be acquired by a deed or by the purchase of a leasehold estate for a term of years. (*Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100, adhered to.)

4. SAME—*a corporation cannot be organized to lease land and construct office building.* A corporation cannot lawfully be organized in Illinois to buy or lease land for the purpose of erecting an office building to rent to its tenants, even though the furnishing of

power, heat, light and water to its tenants is included among the designated purposes of its organization. (*Rector v. Hartford Deposit Co.* 190 Ill. 380, distinguished.)

5. SAME—*a corporation may organize for lawful purpose and hold necessary real estate.* A corporation may be organized in Illinois for any purpose allowed by law and may own the necessary real estate for its business, but it cannot be organized for the purpose of owning real estate and do the necessary business incidental to such ownership.

6. SAME—*prosecution for ouster cannot be barred if there is no law for the organization of a corporation.* Where there is no law authorizing the organization of a corporation for the purposes claimed, no lapse of time and no acquiescence or waiver can bar a prosecution by the public for the ouster of the persons claiming to exercise the franchise.

7. STATUTES—*when principle of contemporaneous construction does not apply.* The principle that in interpreting a statute great regard should be paid to a practical and contemporaneous construction put upon it by public officers charged with its execution is useful in cases of doubtful meaning but it has no application where there is no ambiguity, nor can it be invoked to relieve one from the consequence of following such a construction against a contrary judicial construction by the Supreme Court.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

HARRY S. MECARTNEY, for appellants:

The mortmain policy is a mere statutory policy. It is no part of the common law of the various States. 7 Am. & Eng. Ency. of Law, (2d ed.) 722.

That policy was founded upon the dread of a withdrawal of real estate from trade uses and its being thus controlled by perpetual corporations, which, in turn, were controlled by few persons. 7 Am. & Eng. Ency. of Law, (2d ed.) 1075.

The whole subject is one of statutory control. As the right to hold some real estate or leasehold interest therein is inherent in or resultant from incorporation itself, it is necessary that limitation as to real estate holdings should be express or specific. *Lathrop v. Bank*, 8 Dana, 114.

The true construction of the act of 1872 (treating section 1 as if a comma were inserted between the words "real estate" and "brokerage," which ought not in reality to be done,) is this: That the "purposes" for which corporations are there allowed are business purposes,—business activities; that the exception of the "purpose" of real estate means the business of real estate; that such a business is evidenced by the general purchase and sale of real estate or the unlimited privilege of acquisition of real estate, or of repeated investments in real estate unconnected with other acts in themselves not necessarily involved in such business. The proviso in the exception which allows the "purchase and sale of real estate for burial purposes only," confirms this view, as it is assumed that the general "purchase and sale" of real estate has been excepted. *Hough v. Land Co.* 73 Ill. 23; *Rector v. Deposit Co.* 190 id. 380; *Improvement Co. v. Exchange Co.* 210 id. 26.

The act of purchasing one lot or tract of land is not, when done by an individual, carrying on the "business of real estate," any more than does the negotiating of one sale make one a real estate broker. *O'Neill v. Sinclair*, 153 Ill. 525.

For some of the purposes the charter is legal, and hence it will stand. *Cowell v. Springs Co.* 100 U. S. 55.

A leasehold is personal property. (*Thornton v. Mehring*, 117 Ill. 55; *Railway Co. v. People*, 153 id. 409; 5 Am. & Eng. Ency. of Law, 1025.) And while it may be included in the term "real estate," used in a very general sense, the fact that it is personal property further confirms the view that limited or specific or qualified holdings were not aimed at by the Incorporation act of 1872.

The charter in question here is a contract between the incorporators and stockholders and the State. *Dartmouth College case*, 4 Wheat. 518.

Where moneys have been invested under legal contracts, and especially where there has been a construction of the

courts supporting such contracts or investments, the State has no right, either through the legislature or the judiciary, to annul such contracts. *Harmon v. Auditor*, 123 Ill. 122; *Muhlker v. Railroad Co.* 197 U. S. 546.

F. A. BINGHAM, for appellee:

The rule of contemporaneous construction does not apply where the statute is unambiguous, and where the language of the statute is clear and free from doubt a contrary administrative construction will have no weight. *Whittemore v. People*, 227 Ill. 453.

The general Incorporation act does not authorize the organization of a corporation for the purpose of acquiring real estate and erecting a building thereon to rent to tenants or for the primary purpose of holding real estate for investment. *Building Co. v. Board of Trade*, 238 Ill. 100.

Acquiring a lease for ninety-nine years is acquiring real estate. A corporation organized for the purpose of acquiring a ninety-nine year lease of real estate for the erection of a building to be rented to tenants of the corporation must be regarded as organized for the purpose of acquiring real estate. *Building Co. v. Board of Trade*, 238 Ill. 100.

Mr. JUSTICE DUNN delivered the opinion of the court:

An information was filed in the circuit court of Cook county against appellants charging them with acting as a corporation, under the name of "The Merrimac Building Company," without being legally incorporated. Appellants filed five pleas, to which demurrers were sustained, and appellants electing to stand by their pleas, judgment of ouster was rendered, and this appeal was taken.

The first plea justified under the articles of incorporation of the Merrimac Building Company, which were formally regular, the final certificate bearing the date of April 20, 1896. The duration of the corporation was to be

ninety-nine years, and its objects were stated as follows: "The object for which it is formed is to purchase a leasehold estate in the premises situate in Chicago, Cook county, Illinois, known as sub-lots thirteen (13) and fourteen (14) of lots one (1), two (2), seven (7) and eight (8) of block thirty-seven (37), in the original town of Chicago, to construct, operate and maintain a building thereon, to lease space therein, and to supply the tenants thereof with power, light, water, heat and other service in connection therewith."

The second plea sets out that the Merrimac Building Company, immediately after its incorporation, as mentioned in the first plea, acquired the leasehold of the two sub-lots described in its charter on April 30, 1896; constructed the building in that year; has been in possession of the building and leasehold ever since; has put into the same over \$600,000; has constantly used such franchises and privileges ever since, and claims waiver and acquiescence on the part of the State. It avers that said company constructed and has always operated in said building an elevator plant and a heating plant for the use of all the tenants therein, has always furnished water and other conveniences to them, and has operated said building as a business, furnishing engineers, janitors, firemen, carpenters, repair men and agents therefor at its own expense, and has itself maintained an office in said building for such management and operation.

The third plea avers that there is no public interest to be subserved by the proceeding; that it is being prosecuted solely at the instance of Patterson, who has merely a life estate in one-twelfth of the fee of the two lots described in the charter; that he is estopped to question the franchise, and has been expressly adjudicated to be so estopped in a proceeding heretofore pending between him and the company.

The fourth plea avers the due incorporation of the Merrimac Building Company, referring to the first plea and

making the allegations of the second and third pleas a part of the fourth. It alleges that ever since the passage of the act of the General Assembly of April 18, 1872, under which the said company was chartered, the various Secretaries of State and Attorneys General, and all the public officials having to do with the chartering of corporations or with their supervision or control, have consistently and uniformly treated the said act as authorizing the formation of corporations for building purposes and for the construction and operation of buildings upon real estate, in some instances the charters being limited to specific real estate described therein and in many instances the said charters not being so limited; that immediately or shortly after said act was passed some such charters were issued, under which buildings were constructed which have been operated by such corporations ever since; that from time to time the Secretary of State has issued such charters upon application therefor; that various buildings have been constructed under such charters and operated by such corporations, and many thousands of dollars of taxes have been paid by such companies regularly from year to year; that prior to the present year (1908) none of the officials of the State having to do with the chartering, supervision or control of corporations have ever officially questioned, in any manner, the right of such corporations to exercise their said franchise or privileges; that many of such corporations have been chartered for large sums of money, and that during the last thirty-five years or more, in the city of Chicago alone, upwards of \$100,000,000 have been invested in the stock of such building companies and upwards of \$50,000,000 have been invested in the bonds of such companies, and all upon the faith of the validity and legality of such charters, a list of some of such corporations being attached to the plea.

The fifth plea expressly adopts all of the averments of fact in the prior pleas, and alleges that the defendants are stockholders in said company, and that two of them are

holders of the bonds of said company issued July 1, 1896, to the amount of \$250,000, which were purchased in February, 1905, on the faith that the charter of said company was good and valid, and that any judgment of ouster entered upon the information will impair the obligation of the contracts existing between the said company and its stockholders, bondholders and tenants, and will deprive them of their property without due process of law.

All the reasons urged by the appellants for a reversal of the judgment have been substantially determined adversely to their position in the recent case of *Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100. They insist, however, that that case was wrongly decided and should be overruled, and that in some features this case may be distinguished from it. We have therefore re-examined the question in the light of the arguments with which we have been favored in this case.

The basis for the attack upon the incorporation of the Merrimac Building Company is, that the object of the incorporation is the acquisition and holding of real estate, and that the statute does not authorize incorporation for such purpose. In *Carroll v. City of East St. Louis*, 67 Ill. 568, the question arose whether a corporation created in the State of Connecticut, with power to receive, grant, convey, dispose of and transfer real estate, to take the management and charge thereof and sell and exchange the same for other property, could take and convey the title to real estate in this State. The question was thoroughly examined, the prior legislation of the State was considered in detail, and the conclusion reached that the General Assembly has from the very organization of the government manifested a clear and decided opposition to permitting corporate bodies to hold lands to any great extent in perpetuity, but has limited them to only enough real estate to enable them to carry out and accomplish the purpose of their organization, other than buying and selling real estate. The

present general Incorporation law, then recently passed, was also reviewed, and considered to adhere strictly to the policy manifested by previous legislation. The court held that the same limitation which existed against domestic corporations extended to foreign corporations, and that the latter for that reason could not take and convey title to real estate in this State though having competent authority in the States of their creation. The exercise of their powers in this State was permitted to the extent, and only to the same extent, that similar bodies of our own were allowed under our general laws.

In the case of *United States Trust Co. v. Lee*, 73 Ill. 142, it was again held that the legislature manifestly intended to absolutely prohibit corporations from acquiring or holding real estate, except so far as necessary for the transaction of their business and except such as might be acquired in the collection of their debts. The *Carroll* case was cited, and the court followed the rule there announced, saying: "We * * * must regard the rule as settled in this court and must leave it to the General Assembly to make any change they may deem for the best interest of our community, when it shall be demanded." Up to this time, however, the legislature has not made any change in the doctrine announced in those decisions. The *Carroll* case arose before the passage of the general Incorporation law of 1872, but since its decision, in 1873, it, as well as the *Lec* case, has been frequently cited and approved, and in various cases under the general Incorporation law this court has decided that the General Assembly has declared by its legislation that the public policy of the State will not allow corporations to hold real estate beyond what is necessary for the business or specific corporate purposes of such corporation. (*People v. Pullman's Palace Car Co.* 175 Ill. 125; *First Methodist Church v. Dixon*, 178 id. 260; *National Home Building Ass. v. Home Savings Bank*, 181 id. 35; *Bixler v. Summerfield*, 195 id. 147.) Irrespective of statutory re-

strictions, the doctrine is regarded as a settled principle of American jurisprudence. 5 Thompson on Law of Corporations, sec. 5772.

The public policy of the State is to be determined, in large measure, from its constitution and legislation, judicial decisions and the practice of the executive department. When the legislature has acted upon a subject upon which it has power to legislate, public policy is what the statute, passed by it, indicates. (*Harding v. American Glucose Co.* 182 Ill. 551.) From the time of the enactment of our general Incorporation law it has been uniformly held that the acquiring and holding of real estate are not purposes for which a corporation may be organized. If this holding had been contrary to the legislative intention the legislature might have been expected by some enactment so to declare. It has not done so. The question, after repeated examination, has become well settled, and no reason appears why the rule heretofore announced by the court should be departed from. If any change is demanded by the public interest it must be left to the legislature to make it.

We are referred to three cases which are said to be in conflict with the above conclusions. In *Hough v. Cook County Land Co.* 73 Ill. 23, the corporation was organized under a private act of 1867, and its objects were stated to be, "to examine, survey and purchase lands or interest in lands, water-courses or interests therein, which are, as near as may be, adapted by nature to the use of water to irrigate the same, to facilitate the growth of crops in dry seasons, and to improve and cultivate the same for such crops, chiefly, as require irrigation to produce the largest returns." It changed its name and increased its capital stock under the law of 1872, and thereby became subject to the general law as if incorporated under it. The court in that case was not called upon to decide, and did not decide, upon the power of the corporation to acquire real estate. The bill alleged, and the court assumed but did not decide, that the

corporation had that power to the extent that it was granted by the special charter. The cause was heard on demurrer to the bill, which alleged that the change of name and increase of capital stock were void, and that all the authority appellee had by its charter was to purchase lands for the purpose of irrigation and improvement, for the raising of crops thereon, and the sale and disposal thereof when so improved. The bill was filed to set aside a conveyance of land which the complainant had made to the corporation, on the ground that the corporation was acting in violation of its corporate powers. The court assumed complainant's construction of the statutes to be correct, though it expressly stated that it expressed no opinion thereon, and, so assuming, it held that the corporation being authorized to purchase and hold lands and the complainant having sufficient capacity to convey, the title obviously vested by the delivery of the deed, and the question whether the corporation, by its purchase and use of the lands, had exceeded its powers was one between the State and the corporation, with which the complainant, as a grantor, simply, had no concern.

In *Rector v. Hartford Deposit Co.* 190 Ill. 380, the object of the corporation was "to erect and operate safety deposit vaults." This is a business distinct from the ownership, management and control of real estate. It is necessary to have a location for the business of receiving and storing valuable packages and providing vaults for that purpose, just as it is necessary to have a place for operating a machine shop, a mill, a hotel or a warehouse, all of which are purposes for which a corporation may be organized. The corporation built a fourteen-story building, 150 feet high and 91 feet by 50 feet, on the ground, having a basement, eight stores and over one hundred suites of offices. Its only safety deposit vault was in one end of an office on the fourth floor, and its inside dimensions were 5x6x8 feet. The vault and its earnings were, of course, of no consideration in the business actually transacted by the corporation,

and it was contended that the erection of such a building was a gross abuse of its corporate powers and that the corporation could not recover rent upon a lease of one of the rooms of the building, since the ownership of the building was beyond its corporate powers. But the court held that since the corporation had power to own a building necessary for its corporate purposes, it could be required to answer to the State, alone, for an abuse of such power, and that that question could not be availed of as a defense to a suit for rent. The court, however, did not hold that a corporation organized for the lawful purpose of erecting and operating safety deposit vaults could, under the pretense of erecting a building for corporate purposes, construct a building much larger than required for its legitimate business, containing offices intended to be rented for business purposes and engage in the business of renting such offices.

The point decided in the case of *Merchants' Improvement Co. v. Exchange Building Co.* 210 Ill. 26, on the question of *ultra vires*, was, that since the securing of the Chicago Stock Exchange, including six hundred persons in its organization, as a tenant of the new building proposed to be erected, would, through the business of the stock exchange, probably attract renters not only to the new building but to other buildings in the vicinity, the giving of a lease to the exchange at a nominal rent by the one corporation and the donation of an annual sum to it by the other, for the purpose of securing its occupancy of the building, were not so foreign to their respective corporate purposes as to be *ultra vires*. The case did not consider the question here raised and has no application to this case.

It is insisted that the purchase of a leasehold estate is not the acquisition of real estate. A lease for a term of years is a chattel real. It conveys an interest in the land. While it has some of the attributes of personalty it is treated in many respects as real estate. (*First Nat. Bank of Joliet*

v. *Adam*, 138 Ill. 483; *Knapp v. Jones*, 143 id. 375; Hurd's Stat. chap. 30, sec. 38; chap. 77, sec. 3.) The exception of real estate from the purposes for which corporations may be organized embraces all interests in real estate, including leaseholds.

Included in the object for which the corporation purports to be organized it is proposed to construct, operate and maintain a building on the premises proposed to be leased, to lease space therein, and to supply the tenants thereof with power, light, water, heat and other service in connection therewith. It is urged that there is no substantial difference between an office building and a safety deposit building, and that the furnishing of power, water, light and heat is clearly a valid corporate purpose. The business of erecting and operating safety deposit vaults does not differ in kind from that of a warehouseman. The business transacted is the receipt and storage of goods. It involves no real estate transaction whatever. The depositary must have a place for keeping the deposits, and that involves the acquisition of some interest in real estate necessary to carry on the business. But the business involves no real estate, except incidentally. The contracts of the depositary with its customers for safe keeping are in no sense transactions in connection with real estate. The difference in the operation and management of an office building seems obvious. The business conducted deals entirely with real estate, or is incidental to the care of the property or the performance of the landlord's obligation to the tenants. The furnishing of power, light, water and heat in general is a valid corporate purpose, but it is obviously not valid here. The object is not to furnish power, light, water and heat without restriction. It is to furnish these things to the tenants of a building of the corporation which the corporation has no authority to build, on a lot it has no right to own. All the objects of the corporation's existence rest upon its acquisition of the leasehold of the particular tract.

Without that it cannot build any building, lease any space or furnish any power, light, water or heat. The sole object of its organization is to acquire and hold real estate and nothing else, exercising over it the incidental authority of individual owners to build, improve, lease, and assume and perform the ordinary obligations of owners of real estate and landlords. This it cannot do under the statute. It may organize for any purpose allowed by law and own the necessary real estate for its business, but it may not organize for the owning of real estate and do the necessary business incidental to its ownership.

By their fourth plea the appellants allege that ever since the passage of the act of April 18, 1872, the Secretary of State and Attorney General have treated such act as authorizing the formation of corporations for building purposes and for the construction and operation of buildings upon real estate; that the Secretary of State has issued charters therefor and various buildings have been constructed and operated under such charters; that no State official has ever questioned the right of said corporations to exercise their franchises, and that more than \$150,000,000 has been invested in the stock and bonds of such corporations on the faith of the validity of such charters. It is contended that there is no room for doubt that this is the true construction of the statute, but that if there were such doubt the facts alleged in the plea show a contemporaneous construction of the law by public officers charged with its enforcement which this court should follow. It may be doubted whether such a plea tenders any issue of fact. We express no opinion on that question. The principle sought to be availed of is, that in interpreting a statute great regard should be paid to a practical and contemporaneous construction put upon it by public officers charged with its execution. The doctrine is useful in cases of doubtful construction but it has no application where there is no ambiguity of meaning. (*Whittemore v. People*, 227 Ill. 453.) In such case the

law may be violated but not construed. In Cooley on Constitutional Limitations (5th ed. p. 60,) the rule is thus stated: "If the question involved is really one of doubt, the force of their (officers') judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases,—that the court should confine its attention to the law, and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law-makers."

The decisions cited show that the language of the statute is plain and free from doubt. In 1873,—the year in which the earliest of the charters mentioned in the list attached to the plea was granted,—this court decided that under the statute a corporation could not take and hold real estate more than enough to enable it to carry out the purposes of its organization, other than buying and selling real estate. In the same year, according to the plea, a charter was issued to a corporation "to buy, own, hold in trust, possess, improve, lease, sell and convey real estate." When the decision in *Carroll v. City of East St. Louis, supra*, was rendered, what doubt remained about the question of the power of a corporation to own real estate? Which construction should investors have followed,—that of the Secretary of State or of this court? If they thought the court was wrong or its statements *obiter dicta* they followed the other view at their peril. The *Carroll* case was followed by the *Lee* case the next year, and the court has consistently announced the same doctrine since. In the face of this judicial construction there is no place for the doctrine of contemporaneous construction.

There can be no question of *laches*, acquiescence or waiver on the part of the public. Where there is no law for the formation of a corporation for the purposes claimed, no lapse of time and no acquiescence or waiver can bar a prosecution for the ouster of those claiming to exercise the franchise.

The judgment is affirmed.

Judgment affirmed.

WILLIAM WILCKE, Defendant in Error, vs. CHARLES HENROTIN, Receiver, Plaintiff in Error.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. NEGLIGENCE—*intoxication does not bar recovery nor relieve person from exercise of due care.* The fact that a person may be intoxicated does not relieve him from the duty of exercising ordinary care for his safety, nor does it, of itself, bar his right to a recovery in case he is injured.

2. INSTRUCTIONS—*effect where instructions for both parties ignore question of intoxication.* If there is evidence tending to show that the plaintiff in a personal injury case was intoxicated at the time of the injury, the instructions upon the subject of due care should state that he was required to exercise the same degree of care for his own safety that an ordinarily prudent person would have exercised, under the same circumstances, who was in full possession of all his powers and faculties; but if the defendant's instructions upon that subject ignore the question of intoxication, he cannot complain, on appeal, that the plaintiff's instructions have the same defect.

3. LIMITATIONS—*when amendment does not set up a new cause of action.* Where a suit against a named person, "receiver of" a certain street railway, is, in fact, against such person in his official capacity as receiver, and he appears by counsel and pleads to the declaration, an amendment of the declaration, *præcipe* and summons by inserting the word "as" before "receiver" is proper and does not amount to setting up a new cause of action.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. ARTHUR H. FROST, Judge, presiding.

MAYER, MEYER & AUSTRIAN, for plaintiff in error.

WING & WING, and FRED W. BENTLEY, for defendant in error.

Mr. JUSTICE VICKERS delivered the opinion of the court :

William Wilcke recovered a judgment in the circuit court of Cook county for \$10,000 against Charles Henrotin, as receiver of the Chicago Electric Traction Company, on account of personal injuries received by plaintiff below on September 7, 1903, while a passenger on one of the street cars then being operated by the defendant. The judgment of the circuit court having been affirmed by the Appellate Court, the receiver has sued out a writ of error for the purpose of bringing the record into review in this court.

The errors relied on for a reversal are, that the court erred in instructing the jury as to what constituted ordinary care on the part of defendant in error, and in sustaining a demurrer to the plaintiff in error's plea of the Statute of Limitations.

The suit was instituted on December 29, 1903, by defendant in error against "Charles Henrotin, *receiver* of the Chicago Electric Traction Company." The original declaration, filed on March 11, 1904, contains four counts, and charges that the defendants, "Charles Henrotin, *receiver*, and the Chicago Electric Traction Company," were jointly the owners and operators of the street car line and street car upon which plaintiff was riding at the time of the accident; that plaintiff became a passenger upon said street car and that said defendants did not exercise due care in the carriage of said plaintiff, and that while said plaintiff was exercising due care for his own safety said defendants negligently ran, managed and operated said street car, as a result whereof plaintiff was thrown from said street car and was permanently injured and disabled. The second,

third and fourth counts of the declaration also alleged the joint operation of the car by the defendants at a high and dangerous rate of speed while passing over a reverse curve, and that said curve was negligently maintained, and that said defendants, by their said servants, negligently ran and operated the street car upon which the plaintiff was riding, over said reverse curve. On September 22, 1904, the plaintiff filed four additional counts to said declaration, of the same general purport as the original counts, except that in the additional counts the location of the accident was more specifically stated. To this declaration the defendants below pleaded the general issue. On August 23, 1906, the plaintiff below obtained leave to amend the declaration and the additional counts, and also the *præcipe* and summons, by inserting the word "as" after the name "Henrotin" and before the word "receiver" wherever the same occurred. To the declaration thus amended defendants below again pleaded the general issue, and Charles Henrotin, as receiver, filed a further plea of the Statute of Limitations, relying on the claim that the amendment to the declaration stated a new cause of action. To this special plea the court sustained a demurrer, and Henrotin, as receiver, preserved an exception, and the ruling of the court in sustaining the demurrer to this plea is the subject of an assignment of error in this court. At the close of the evidence for the plaintiff below the court directed a verdict in favor of the Chicago Electric Traction Company, and afterwards plaintiff again amended his declaration by discontinuing the cause as to the Chicago Electric Traction Company and by substituting the word "defendant" for "defendants" wherever the same appeared in the declaration. The latter amendment was made after the case was tried and after the verdict of the jury had been rendered and while the motion for a new trial was pending.

There is no serious conflict in the evidence. On the day in question, which was Labor Day, about nine o'clock

in the evening, defendant in error boarded an open street car in Blue Island with his wife and some friends to go to his home. Defendant in error and a Mr. Benjamin took the first seat in the rear, which afterward they surrendered to their wives, and there being no other vacant seats, the defendant in error stood up on the rear platform, facing toward his wife. While in this position the car, running at a high rate of speed down an incline, encountered a sharp reverse curve, which caused the car to sway so violently and suddenly as to throw defendant in error off the car on to the pavement, inflicting very serious injuries.

There was some evidence tending to prove that defendant in error took a drink with his friend Benjamin just as they were coming out of the gate to go home, and some of the witnesses expressed the opinion that defendant in error was slightly intoxicated at the time of the accident, although the clear preponderance of the evidence on this question shows that he was not intoxicated. This question is only material in connection with the contention of plaintiff in error in respect to the giving of certain instructions of which complaint is made. The instructions complained of are as follows:

"The court instructs the jury that by 'ordinary care on the part of plaintiff' the law means such a degree of care under the circumstances and in the situation in which the plaintiff was placed, so far as that may be shown by the evidence, as an ordinarily prudent man would exercise under like circumstances and in the same situation."

"The court instructs the jury that the degree of care that the plaintiff was required to exercise for his own safety at and before the time of the accident in question was ordinary care, and if the jury believe, from a preponderance of the evidence in this case, that the plaintiff, at the time of and before the accident in question, exercised the degree of care for his own safety that an ordinarily prudent person would have exercised under the same circumstances and

conditions that the evidence in this case shows surrounded the plaintiff at and before the time of the accident in question, then you should find that the plaintiff, at and before that time of the accident in question, was in the exercise of ordinary care for his own safety."

The criticism made on these instructions is, that they only required the defendant in error to exercise the same degree of care that would be expected of any other intoxicated person; that the expression in the instructions, "under the circumstances," would be understood by the jury as referring to and including the circumstance, if it existed, that defendant in error was more or less intoxicated. If defendant in error was intoxicated at the time of his injury it neither bars his right to recover nor relieves him from the duty of exercising reasonable care for his own safety. (*South Chicago City Railway Co. v. Dufresne*, 200 Ill. 456.) There was evidence slightly tending to prove that defendant in error was intoxicated at the time of the accident, although the fair preponderance of the evidence showed that while he had drank two or three glasses of beer, yet he was not perceptibly under the influence of liquor. The instructions complained of should have informed the jury that defendant in error was required to exercise the same degree of care for his own safety as an ordinarily prudent person would have exercised, under the circumstances, who was in the full possession of all of his powers and faculties, thus imposing on defendant in error the same degree of care that would be required of a person who was entirely sober. But we are of the opinion that the omission in these instructions should not lead to the reversal of this case, since the last instruction given at the request of plaintiff in error lays down the rule in respect to the care required of defendant in error, and that instruction omits all reference to the subject of intoxication. The error complained of in the instructions is found in the last instruction given for plaintiff in error. Under these cir-

cumstances plaintiff in error is in no position to complain of the error pointed out in the given instructions.

Plaintiff in error next contends that the court erred in sustaining a demurrer to the special plea of the Statute of Limitations to the amended declaration. The argument in support of this contention is, that the action in its original form against "Henrotin, receiver," was an action against Henrotin personally, and that when the declaration was amended so as to describe Henrotin "*as*" receiver, the action was against him in his official or representative capacity. It was stipulated on the trial that Henrotin was the duly qualified and acting receiver of the Chicago Electric Traction Company at the time of the accident and that he had full power and authority to appear and employ counsel to defend the suit, and that he had employed for that purpose the firm of Moran, Mayer & Meyer. These attorneys appeared and filed a plea to the original declaration and also to the amended declaration. There is nothing in this record from which it could have been supposed that the defendant in error was seeking to enforce a personal liability against Henrotin. Had the cause proceeded to judgment without the amendment having been made and the judgment had been rendered against Henrotin, receiver, and the record being otherwise free from error, this court would, under the authority of *McNulta v. Ensich*, 134 Ill. 46, have reversed the judgment and remanded the cause, as was done in that case, with directions to enter a judgment against Henrotin *as* receiver, to be paid in due course of administration. The suit was, in fact, against Henrotin *as* receiver, and not against him personally. This being true, the court below would have been authorized, after the trial, to enter a proper judgment against defendant *as* receiver, without reference to the formal defect in the declaration.

In *Thomas v. Fame Ins. Co.* 108 Ill. 91, after the policy limitation had run against an insurance policy, a suit upon which had been prosecuted in the name of Manns as plain-

tiff, the plaintiff amended his declaration and substituted the name of Thomas as plaintiff. This court held that the substitution of Thomas, as plaintiff, for Manns, after the limitation for bringing the action had run, was not the commencement of a new suit but was a continuation of the same cause of action and that the plea of the insurance company presented no defense. This court, on page 100, said: "If, then, both the action and cause of action, before and after the amendment, were precisely the same, as they certainly were, then the limitation of one year in the policy clearly presented no defense to the action, as it is conceded the original action was commenced within the year."

In *Metropolitan Life Ins. Co. v. People*, 209 Ill. 42, on page 48, it is said: "A mere change in a party to a suit does not, of itself, change the cause of action or ground of recovery, and unless the cause of action is a new one the amended declaration is not subject to the Statute of Limitations,"—citing *Thomas v. Fame Ins. Co. supra*.

In *Pennsylvania Co. v. Sloan*, 125 Ill. 72, an action on the case for personal injuries was brought against the defendant as the "Pittsburg, Fort Wayne and Chicago Railroad Company," and, after the Statute of Limitations had run, the plaintiff was given leave to amend by substituting the Pennsylvania Company in place of the Pittsburg, Fort Wayne and Chicago Railroad Company. The cause was continued and an *alias* summons was issued and served upon the same person upon whom the first summons had been served, in obedience to which the Pennsylvania Company appeared by the same counsel that had formerly appeared for the Pittsburg, Fort Wayne and Chicago Railroad Company and pleaded the Statute of Limitations. This court held that the identity of the action was the same and that it was not a new case against the Pennsylvania Company, and that the proceeding was merely to change the description or correct a defect in the name of a party defendant, and that the Statute of Limitations could not be invoked as

a defense. This court in that case, on page 79, said: "The defendant originally sued was called the Pittsburg, Fort Wayne and Chicago Railroad Company. As the corporation formerly known by that name was virtually defunct and existed only to wind up old business and not to attend to new business, appellant's officers and agents could not have supposed that corporation to have been the defendant intended to be sued, when service was had upon appellant's own representative in Chicago."

So we think it may be said in the case at bar. The addition of the word "as" after the name "Henrotin" and before the word "receiver" was merely for the purpose of making the declaration express in technical language the sense in which it was understood by all of the parties in its original form. When the summons was served upon Charles Henrotin, receiver of the Chicago Electric Traction Company, he must have known that he was being sued in his representative capacity. The firm of attorneys whom he had been directed by the court appointing him to employ were called in to make his defense, and they, without objection, interposed pleas for him. The suit being thus treated as a suit against Henrotin as receiver, there was no error in allowing an amendment to the declaration making it express what both parties understood it to mean in its unamended form. The amendment did not set up a new cause of action, and there was therefore no error committed in sustaining the demurrer to the plea of the Statute of Limitations.

There are no other reasons urged by plaintiff in error for the reversal of this judgment.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

FRANK MAISS, Appellee, vs. THE METROPOLITAN AMUSEMENT ASSOCIATION, Appellant.

Opinion filed June 16, 1909—Rehearing denied October 12, 1909.

1. **STATUTES**—*whole act should be considered in construing provision of a statute.* In construing a certain provision of a statute the whole act should be considered, since the words and meaning of one part may furnish an explanation of another.

2. **COURTS**—*action of tort is included in fourth class cases under Municipal Court act.* In view of section 40 of the Municipal Court act, prescribing the form of statement in a case of the fourth class, "if the suit be for a tort," the words "all civil actions * * * for the recovery of money only," used in the fourth clause of section 2 of said act, which defines cases of the fourth class, must be construed as including actions for damages for torts where the amount claimed does not exceed \$1000, exclusive of costs.

3. **NEGLIGENCE**—*frightening horses with searchlight—when the case should go to jury.* Proof that plaintiff, while exercising due care for his safety in driving a gentle horse on a public highway in the night time, was thrown from his buggy and injured when the horse became frightened by the beam of the defendant amusement company's searchlight being thrown upon it, justifies the refusal of the trial court to direct a verdict for the defendant.

APPEAL, from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. EDWARD A. DICKER, Judge, presiding.

This was an action of the fourth class brought by appellee in the municipal court of the city of Chicago to recover damages for personal injuries alleged to have been sustained by the appellee and for damages to his buggy. Appellant conducts an amusement park at Cottage Grove avenue and Sixtieth street, in the city of Chicago, and in connection therewith operated an electric searchlight placed on a tower and so constructed and arranged that the light could be thrown from it by the operator in a horizontal or vertical path. The appellee, on the 15th day of May, 1905,

after dark, was driving a horse, which he testified was so quiet it could be driven by a child, in the vicinity of appellant's amusement park, when the searchlight was thrown down in the horse's face, frightening it so that it ran away, threw the appellee out and injured him and damaged the buggy he was riding in. A trial by jury resulted in a verdict and judgment for appellee for \$150. That judgment was affirmed by the Appellate Court for the First District, and on a certificate of importance by that court a further appeal is prosecuted to this court.

BLUM & BLUM, for appellant:

The municipal court had no jurisdiction of this cause, and should have sustained the motion of appellant to dismiss it on the ground that this was not an action "for the recovery of money only." Laws of 1907, p. 227; *Tuthill v. Smith*, 6 Abb. Pr. 329; *Gordon v. Gaffey*, 11 id. 1; *People v. Bennett*, 6 id. 343; *West v. Brewster*, 1 Duer, 647; *Hyde Park v. Teller*, 8 How. Pr. 504; *Voorheis v. Scofield*, 7 id. 51; *Field v. Morse*, id. 12; *Jones v. Null*, 9 Neb. 57; *Addison v. Sujette*, 27 S. E. Rep. 631; *Powell v. Bennett*, 4 Ind. App. 112; *Crossman v. Lindsley*, 42 How. Pr. 107; *Chudnovski v. Eckels*, 232 Ill. 312.

The authority of the municipal court in actions of the fourth class under clause *c* is limited, except in amount, to the same extent as is the jurisdiction of a justice of the peace. Laws of 1907, p. 227; *Railway Co. v. Galt*, 133 Ill. 668; *Haywood v. Collins*, 60 id. 333; *White v. Wagar*, 185 id. 201.

Where the injury could not have been foreseen there is no liability. *Craven v. Brown*, 175 Ill. 401; *Cole v. Fisher*, 11 Mass. 137.

Appellant owed appellee no duty, and hence could not be liable for negligence. *Railway Co. v. Morrison*, 20 Am. Neg. Rep. 327; *Craven v. Brown*, 175 Ill. 401; *Railroad Co. v. Mock*, 88 id. 87; *Railroad Co. v. Wellhoener*, 72

id. 60; *Williams v. Railroad Co.* 135 id. 491; *Sack v. Do- lese*, 137 id. 129; *McAndrews v. Railway Co.* 222 id. 232.

An action for negligence is based upon a neglect of duty, and both the duty and the neglect must be proven by plaintiff. *Hendricks v. Railway Co.* 93 N. W. Rep. 141; *Railroad Co. v. Mock*, 88 Ill. 87; 2 Thompson on Negligence, 603; *Railroad Co. v. Wellhoener*, 72 Ill. 60; *Coleman v. Railroad Co.* 114 Ga. 386; *Williams v. Railroad Co.* 135 Ill. 491; *Webb v. Railroad Co.* 202 Pa. St. 511; *McAndrews v. Railway Co.* 222 Ill. 232.

The act of appellant was lawful and violative of no law. *Amusement Co. v. Brocksmitth*, 17 Am. Neg. Rep. 498.

Plaintiff failed to show, by a preponderance of the evidence, or, in fact, by any evidence, that defendant operated the searchlight in a negligent manner. *McAndrews v. Railway Co.* 222 Ill. 236.

FRANK L. DELAY, for appellee:

The municipal court had jurisdiction of the cause. *Chudnovski v. Eckels*, 232 Ill. 312; *Jones v. Null*, 9 Neb. 57; *Ex parte Sweeney*, 126 Ind. 583; *Benson v. Christian*, 129 id. 535; *Huntington v. Burke*, 139 id. 162.

The doing of anything unusual, unnatural or unnecessary upon or adjacent to a public highway, causing horses to become frightened and injury to result, entitles the one injured to damages. 1 Shearman & Redfield on Negligence, (5th ed.) 607; Cooley on Torts, (2d ed.) 705, 799, and notes; Bishop on Non-Contract Law, sec. 529; *Conklin v. Thompson*, 29 Barb. 218; *Cole v. Fisher*, 11 Mass. 137; *Railroad Co. v. Harmon*, 47 Ill. 298; *Railroad Co. v. Dickson*, 63 id. 151; *Railroad Co. v. Scheffner*, 209 id. 9; *Railroad Co. v. Hayer*, 225 id. 613; *Railroad Co. v. Steckman*, 224 id. 500.

It is a question of fact whether a given cause is sufficient to frighten gentle horses, carefully driven. *Railroad Co. v. Scheffner*, 209 Ill. 9.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

The principal contention of appellant is, that the municipal court had no jurisdiction of this cause and should have sustained appellant's motion to dismiss the suit. The action was brought as one of the fourth class provided for in the fourth clause of the second section of the Municipal Court act. Said clause reads as follows:

"*Fourth*—Cases to be designated and hereinafter referred to as cases of the fourth class, which shall include (a) all civil actions, *quasi* criminal actions excepted, for the recovery of money only when the amount claimed by the plaintiff, exclusive of costs, does not exceed one thousand dollars (\$1000), the amount in any action on a bond to be determined by the amount actually sought to be recovered and not by the penalty of the bond; (b) all actions for the recovery of personal property when the value of the property sought to be recovered does not exceed one thousand dollars (\$1000); (c) all actions of forcible detainer; (d) all proceedings for the trial of the right of property; and (e) all actions and proceedings of which justices of the peace are now given jurisdiction by law and which are not otherwise provided for in this act, in which class of actions and proceedings the municipal court shall have jurisdiction where the amount sought to be recovered does not exceed one thousand dollars (\$1000.) In any action of the fourth class for the recovery of money only judgment may be rendered for over one thousand dollars (\$1000), where the excess over one thousand dollars (\$1000) shall consist of interest or damages or costs accrued after the commencement of such action."

Appellant contends that civil actions "for the recovery of money only," mentioned in said clause, means actions upon contracts, express or implied; that the legal significance of the term, actions "for the recovery of money only,"

is, that there must be money due to the plaintiff from the defendant in the relation of debtor and creditor. The question is one of statutory interpretation or construction. Unless the municipal court was given jurisdiction of personal injury cases by said fourth clause of the second section of the act where the amount claimed, exclusive of costs, does not exceed \$1000, it has no jurisdiction of such cases.

The object of statutory interpretation and construction is to ascertain and give effect to the legislative intent, when it is not in violation of the fundamental law and does not lead to mischievous and absurd consequences. "As a general rule, the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context, or otherwise, that they were used in a different sense. In the construction of statutes a word which has two significations should ordinarily receive that meaning which is generally given to it in the community, but when this construction would contravene the manifest intention of the legislature we must depart from this rule and give effect to the intention." "Where a word having a technical as well as a popular meaning is used in the constitution or a statute the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense." (2 Lewis' Sutherland on Statutory Construction, secs. 390, 394.) The popular signification of an action "for the recovery of money only," is an action where only a money judgment is sought, as distinguished from relief other than for the recovery of money.

That the legislature intended to include actions in tort in the fourth clause is evident from section 40 of the act. That section defines the procedure in cases of the fourth class, and provides that the statement of plaintiff's claim, "if the suit be for a tort," "shall consist of a brief statement of the nature of the tort and such further information as will reasonably inform the defendant of the nature of

the case he is called upon to defend." One of the rules of construction of statutes is, that the whole act must be considered, as the words and meaning of one part of it may lead to and furnish an explanation of the sense of another.

Appellant cites decisions of courts of some other States where, in construing statutes authorizing attachments in actions brought for the recovery of money, it was held that the legislative intent was that attachments should only be authorized where the action was upon a contract and where the relation of debtor and creditor existed. These authorities, however, cannot be controlling in this case, for in our opinion the legislative intent in adopting the Municipal Court act was to include cases of the character under consideration in the fourth class.

There was no error in denying the motion to dismiss the suit for want of jurisdiction.

Appellant moved the court to direct a verdict in its favor, which motion was overruled, and it is contended that no negligence of appellant was proven; that it owed appellee no duty; that the appellee was guilty of contributory negligence, and that therefore no right of recovery was established by the evidence. The proof shows appellee was driving on a public street; that the horse he was driving was a quiet animal, and that it became frightened at the searchlight being thrown in front of and upon it and ran away, injuring the appellee and damaging his buggy. The proof tends to show appellee was exercising reasonable care. No evidence was offered by appellant. There is no reasonable basis for the contention that the proof did not reasonably tend to support appellee's cause of action.

There was no error in the admission of testimony, and we find no reason why the judgment of the Appellate Court should be disturbed, and it is therefore affirmed.

Judgment affirmed.

DULCINA M. HAYDEN, Appellee, vs. FRANK A. HAYDEN,
Appellant.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. DEEDS—*when a deed cannot be set aside.* A deed knowingly and understandingly made by a wife in consideration of her husband's promise to transfer to her a certain amount of the stock of a corporation cannot be set aside upon the ground that after the certificates of stock were delivered to her they were surreptitiously taken by a subsequent purchaser of the property.

2. SAME—*grantor cannot set aside deed to corporation because the grantee exceeded its power.* The grantor in a deed made to a manufacturing corporation has no standing, in equity, to set aside the deed upon the ground that the corporation exceeded its power in taking the real estate, which was residence property, since the State alone can interfere where a corporation, having power to hold real estate for the purposes of its business, exceeds such power.

APPEAL from the Superior Court of Cook county; the
Hon. FARLIN Q. BALL, Judge, presiding.

JOHN M. DUFFY, for appellant.

JOHN J. SWENJE, and T. F. MONAHAN, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county setting aside three deeds to certain real estate in the city of Chicago. The bill alleged that appellee was married to Austin B. Hayden in 1895 and lived with him until his death, on September 26, 1903; that she had \$600 at the time of her marriage and for three years she was employed and received \$25 a week and supported herself and her husband, besides advancing large sums to him; that on March 12, 1902, in consideration of the money so advanced and expended and of love and affection, her husband purchased and had conveyed to her lot 1, in block 1, in Ashland's addition to Chicago; that she immediately

spent \$2000 in improvements, and she and her husband resided upon said premises until his death and she has ever since resided there; that her husband organized a corporation called the Hayden Automatic Scale Company, which name was afterward changed to Hayden Manufacturing Company, of which he owned all the stock except two shares, and to which he assigned the patents for a computing scale, time lock and other devices which he had invented; that in March, 1903, her husband insisted upon her conveying said real estate to the Hayden Manufacturing Company, and agreed, in consideration thereof, to transfer to her 498 shares of the stock of said company; that he represented that he held a mortgage of \$7500 on said real estate, which he would foreclose unless she conveyed the premises; that she has since learned that there was no mortgage on the premises, but, believing his statement, she, without consideration except his promise to transfer said stock to her, conveyed the premises to the Hayden Manufacturing Company, which on September 23, 1903, conveyed the said premises to Frank A. Hayden, her husband's brother, who now holds the title thereto but with notice of appellee's rights; that the certificates of stock were delivered to her but never assigned in writing, and that after her husband's death Frank A. Hayden surreptitiously obtained possession of them and still retains them. Frank A. Hayden, the heirs and administrators of Austin B. Hayden, and the Hayden Manufacturing Company, were made defendants, and the bill prayed that the deeds to the Hayden Manufacturing Company and to Frank A. Hayden be set aside, that Frank A. Hayden be restrained from interfering with her control of the premises and that the shares of stock be transferred to her.

The answer of Frank A. Hayden denies many of the material averments of the bill, and sets up that on October 30, 1903, the appellee executed to him a quit-claim deed of the premises. By a supplemental bill the appellee alleges

that the first time she ever heard of said quit-claim deed was after the filing of said answer; that if such deed was executed it was obtained from her through fraud, she believing that she was merely signing a receipt for \$1200, and she prays that this deed also may be set aside.

There is no evidence that the appellee had \$600, or any other sum, when she married Austin B. Hayden, or that she spent \$2000, or any other sum, in the improvement of the property in question. There is evidence that on three or four occasions she gave him money but no evidence as to the amount. There is evidence that she sometimes paid their board but no evidence as to the amount, and no evidence that he was ever indebted to her in any amount. He did, however, cause this property to be conveyed to her, voluntarily, so far as the evidence shows. The only evidence in regard to the circumstances attending the conveyance to the Hayden Manufacturing Company was that of the appellee's sister, who testified that appellee's husband wanted appellee to turn the property over to him and he would give her the stock of the company in exchange for it, and that he said there was a \$7000 mortgage on it and he would foreclose it if she did not sign a quit-claim deed to him. There is no evidence as to whether there was or was not a mortgage on the premises. The deed to the Hayden Manufacturing Company was knowingly and intentionally executed in consideration of the promise of the grantor's husband to transfer to her stock of the company, and there is not the slightest evidence that would justify setting it aside. The bill alleges that the certificates of stock were delivered to her but were afterward surreptitiously taken by the appellant. This would not authorize the setting aside of the deed. In such case appellee has her remedy to reach the stock or the wrongdoer.

It is suggested in appellee's brief that the Hayden Manufacturing Company had no corporate power to take and hold the title to the property. It is said that that corpora-

tion was organized to carry on a manufacturing business, and that the property was never occupied or used by it in its business but was a residence, which it could not legally own. The corporation had the power to acquire real estate for the purposes of its business, and if in taking the conveyance it exceeded its powers the State alone can interfere. (*Rector v. Hartford Deposit Co.* 190 Ill. 380.) Such fact is not cause for setting aside the deed at the suit of the grantor. Having parted with her title she has no interest which can be made the basis for equitable relief. *Hough v. Cook County Land Co.* 73 Ill. 23.

The testimony of the appellant, Frank A. Hayden, discloses that his brother, Austin B. Hayden, two or three days before his death, told the appellant that he wanted to deed the premises to appellant in trust for his mother, sisters and brothers, and that he thereupon caused the deed to be executed by the Hayden Manufacturing Company to appellant. It is insisted that Austin B. Hayden having no title to the property could not create a trust therein, and that such trust could only be proved by writing. These propositions, however, have no application to the case, because after appellee's conveyance she had no such interest in the property as was required to give her a standing in a court of equity.

As to the quit-claim deed to Frank A. Hayden, the appellee denied its execution. She is contradicted by the certificate of the officer who certified to her acknowledgment and his testimony as a witness. The evidence is entirely inadequate to set aside the conveyance. Her testimony, and that of the attorney of the appellant, who was also the notary public who took her acknowledgment, are flatly contradictory; but, taking their testimony in connection with the documentary evidence which was produced and the circumstances of the case, we are satisfied that the deed in question was knowingly executed by her with a full understanding of its effect.

The evidence was insufficient to warrant the decree, and it is therefore reversed and the cause is remanded to the superior court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

F. M. BRICKEY, Plaintiff in Error, *vs.* JOHN LINNERTZ,
Defendant in Error.

Opinion filed June 16, 1909—Rehearing denied October 13, 1909.

1. EQUITY—*where equities are equal the law must prevail.* A court of equity will not enjoin the prosecution of an ejectment suit where the only question is whether the complainant or the defendant, having equal equities, shall be given the benefit of whatever title may have been acquired under the Statute of Limitations.

2. RESCISSION—*the remedy by rescission should be resorted to in apt time.* Where, by mistake, the grantor conveys land which he did not intend to convey and which the grantee did not bargain for, and the grantor does not, in fact, own the land the parties supposed was being conveyed, the only remedy available is rescission; but that remedy, to be effectual, should be resorted to in apt time between the parties to the conveyance.

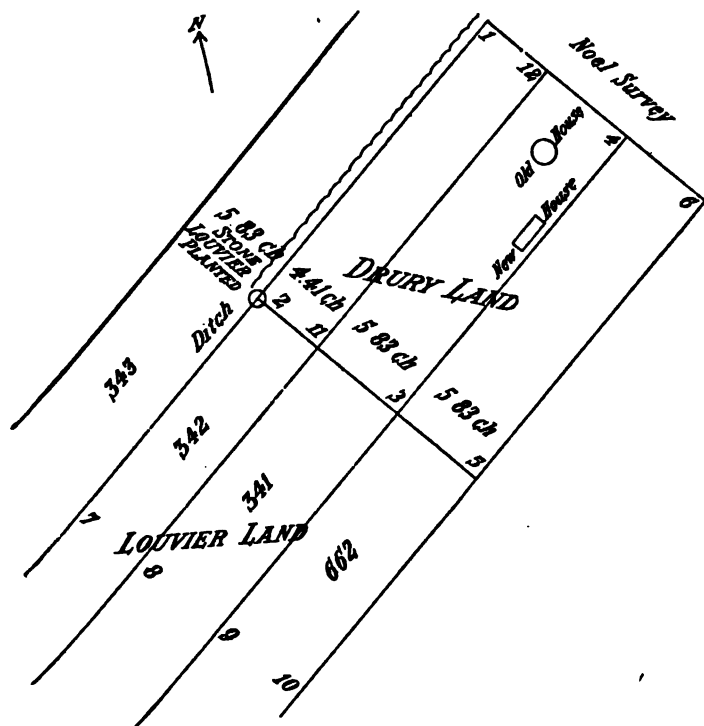
WRIT OF ERROR to the Circuit Court of Monroe county;
the Hon. B. R. BURROUGHS, Judge, presiding.

The litigation involved in this case was commenced in 1896 by defendant in error, Linnertz, bringing an ejectment suit against plaintiff in error, Brickey, for the recovery of a tract of land known as a part of survey 342 of the commons field of Fort Chartres. Said commons field appears to have been situated partly in Monroe and partly in Randolph counties, and was originally surveyed into narrow strips from the south-west to the north-east. Part of these surveys, designated by Nos. 341 to 345, inclusive, were in the neighborhood of three miles long and varied in width, the narrowest one (No. 345) being 4.33 chains

and the widest (No. 344) being 8.75 chains. Survey 341 is the south-east survey of those mentioned and survey 345 the north-west survey. Survey 662 lay adjoining and immediately south-east of survey 341. The land involved in the ejectment suit was, as we have said, the north-east end of survey 342, and contained between forty and forty-five acres.

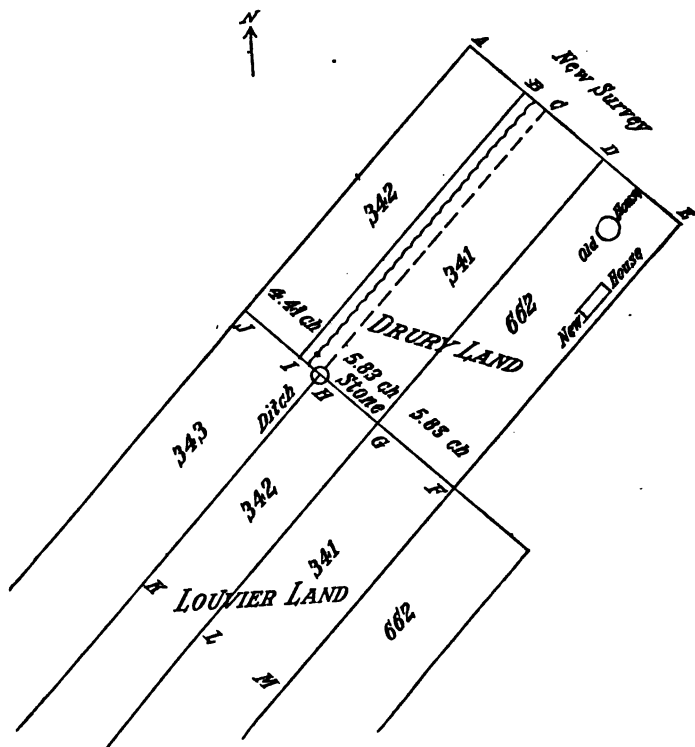
In 1854 Franklin W. Brickey, father of plaintiff in error, owned the whole of surveys 341 and 342, and at that time he owned no other land in the neighborhood of these surveys. In that year he conveyed the south-west ends of said surveys, containing one hundred and forty-eight acres, more or less, to Eugene Louvier, and in 1855 he conveyed the north-east ends of said surveys, containing one hundred acres, to John Drury. Subsequently F. W. Brickey acquired tax deeds to the whole of survey 343, which adjoins survey 342 on the north-west. After the death of F. W. Brickey, which occurred several years ago, plaintiff in error, a son, acquired title from his co-heir to the whole of survey 343. In 1879 Drury sold his portion of surveys 341 and 342 to J. J. Linnertz, father of defendant in error. J. J. Linnertz subsequently died, and defendant in error bought the interest of his co-heirs and became the owner of the whole of that portion of surveys 341 and 342 conveyed by Brickey to Drury. At the time the conveyance was made from Brickey to Louvier, county surveyor Noel ran the lines of the portions of surveys 341 and 342 conveyed to Louvier. The portions of said surveys conveyed to Drury adjoined Louvier's north-east line and contained the remainder of said surveys. When Drury conveyed to Linnertz, deputy county surveyor Gardner ran the lines of the portions of the surveys so conveyed, and in making the survey treated the lines as running straight from one end of the surveys to the other, without any deviation or jog. About the year 1888 surveyor Gardner claimed to have discovered that the lines of said surveys did not run straight

through from one end to the other but jogged north-west at the point where the land conveyed by Brickey to Louvier joined that conveyed to Drury, which, as we understand it, is the line between Monroe and Randolph counties. The lines of surveys 662, 341, 342 and 343, as they were supposed to exist when the conveyances were made to Louvier and Drury and as then run by the surveyors, are shown by the following plat, designated as plat No. 1:



The location of a stone planted by Louvier at the north-east corner of his land is shown; also the location of two houses on the land supposed to have been bought by Drury, both of which are on survey 341 if the lines are extended straight through. The wavy line immediately north-west of the north-east end of survey 342 is intended to show the location of a ditch made by Brickey after he acquired the

title to survey 343. The following plat, N^o. 2, shows the lines of the same lands according to the new survey:



It will be seen from plat No. 2 that according to the new survey the possession of Drury included no part of survey 342, which Brickey owned and which was described in the deed to Drury and the deed from Drury to Linnertz, but does include a part of survey 662, which Brickey did not own and which was not described in either of said deeds. Taking the new survey, plaintiff in error, under his claim of title to survey 343, had possession of the north-east end of survey 342, and it is the said north-east end of survey 342, as shown by the new survey, which the defendant in error claims title to by *mesne* conveyance from Brickey, which the ejectment suit was brought to recover.

At the first trial of the ejectment suit the court directed a verdict for defendant at the close of all the testimony and entered a judgment finding the defendant not guilty. That judgment was reversed by this court and the cause remanded. (*Linnertz v. Dorway*, 175 Ill. 508.) Upon the second trial of the ejectment suit in the circuit court there was a judgment for plaintiff, Linnertz. Brickey paid the costs and took a new trial under the statute, but before trying the case again, filed this bill to enjoin the prosecution of the ejectment suit on the ground that he had equitable defenses that could not be availed of in an action of law.

The bill alleged that in 1855 Franklin W. Brickey, the father of the complainant, owned surveys 341 and 342, in the counties of Monroe and Randolph, State of Illinois, and that, as shown by the government field notes and plats, these surveys were slender bodies of land, extending from the base line, where they began, north-eastwardly, rectangular in form, with northerly and southerly sides parallel and straight, and were crossed by a line fifty arpents from the base line, running parallel with said base line and the easterly end of said survey; that survey 341, as shown by government field notes and plats, is five chains and eighty-three links wide, survey 342 is four chains and forty-one links wide, and survey 343, which is next adjoining 342 on its north-westerly side, is of the same shape and length as surveys 341 and 342 and is five chains and eighty-three links wide. The bill alleges that in January, 1855, Brickey sold to Louvier the south-westerly ends of surveys 341 and 342, which included all the land therein from the base line north-easterly to a line crossing said surveys at right angles, fifty arpents north-easterly from the base line; that prior to said conveyance Brickey and Louvier had the lines of said surveys run by a surveyor who was or had been county surveyor of Randolph county; that he ran the lines, as shown by the government notes and plats, straight from

the base line to the easternmost extremity of said surveys, and all parties then, and for long years thereafter, supposed the lines so run to be correct. The bill further alleges that in 1858 (but the proof shows the correct date was 1855) Brickey sold to John Drury the remaining portions or north-easterly ends of said surveys 341 and 342, being the same land previously surveyed as the north-easterly ends of surveys 341 and 342; that the ends bargained for by Drury and sold to him by Brickey, and which they both supposed were being conveyed, were embraced within the lines on the south-easterly side of survey 341 and the north-westerly side of survey 342, running straight and parallel with each other through to the north-easterly ends of said surveys; that Drury, under said conveyance, took possession of said ends as parts of surveys 341 and 342, according to the lines previously run by the surveyor, so that the lands conveyed to Louvier and those conveyed to Drury formed a continuous body of land rectangular in shape, without any break or jog in the side lines of either of said surveys from one end to the other. The bill alleges that Drury retained possession of the said land until 1879, when he bargained and sold the land he was so in possession of, to John J. Linnertz, father of defendant to the bill; that said Linnertz took possession of the same lands Drury had occupied and afterwards died intestate while so in possession; that the defendant, John Linnertz, purchased the interest of his co-heirs and has continued in possession thereof; that in the conveyance from Drury to John J. Linnertz, and the conveyance from John J. Linnertz's heirs to John Linnertz, the description of the land was substantially the same as that in the deed from Brickey to Drury. The bill alleges that in 1873 Franklin W. Brickey purchased at tax sale survey 343 and afterwards took possession of what he supposed to be said survey, cleared the same and remained in possession thereof until his death; that by his last will and testament Franklin W. Brickey de-

vised said survey 343 to complainant, F. M. Brickey, who has ever since his father's death been in possession of it. (The land he has so been in possession of as survey 343 is shown in plat No. 1 as adjoining and lying parallel with survey 342 in said plat throughout its entire length.) The bill further alleges that in 1895 John Linnertz had said lands surveyed by three surveyors; that the said surveyors claimed the side lines of said lands did not run straight from the base line at the south-west ends to the north-east ends, but that at a point fifty arpents north-east from the base line there was a jog to the north-west, as shown in plat No. 2; that according to said new survey the north-easterly end of survey 342 is no longer where it had always previously been supposed to be but is where survey 343 was always supposed to be. The bill alleges that in pursuance of said survey John Linnertz now claims the north-easterly end of what was always supposed to be survey 343, which is in possession of and is claimed by complainant; that the said Linnertz is in full possession of the land sold by Franklin W. Brickey to Drury, but claims the north-easterly end of what was always supposed to be survey 343 in addition thereto, on the ground that by the new survey it is a part of survey 342; that he had begun an action of ejectment against the complainant to recover possession thereof; that, regardless of all surveys, the land actually taken possession of by Drury and by Linnertz is the identical land bargained and sold to Drury and is the identical land on which the minds of said parties met, and that their minds never met on the lands now in controversy as part of survey 342; that Drury and Linnertz have been in continuous possession of the land they bargained for from the date of the conveyance by Brickey,—a period of nearly fifty years,—and that their possession during all that time has been undisturbed. The bill alleges that in equity and justice Linnertz should be confined to the land he is so in possession of, and should not be permitted to retain it and

in addition thereto recover the land in controversy. The prayer is that Linnertz be perpetually enjoined from prosecuting the ejectment suit and from otherwise disturbing the complainant's possession to the lands sued for in said ejectment suit, and that complainant's title thereto be quieted.

The answer denies that the lines of surveys 341, 342 and 343 are as shown in plat No. 1, and denies that Brickey bargained and sold to Drury the north-east ends of surveys 341 and 342 as shown in said plat, and avers that Brickey sold to Drury one hundred acres off the north-east ends of surveys 341 and 342. The answer denies that Drury, under the deed from Brickey, took possession of the land as shown in plat No. 1 or that the land he took possession of was a continuous body of land such as is shown by said plat, and avers that Drury did take possession of certain land called for in his deed from Brickey and retained possession thereof until he sold to Linnertz, in 1879; denies that the land so taken possession of by Drury under the conveyance included what is shown in plat No. 1 to be the north-east end of survey 341, and avers that Drury had before that time for many years been in possession of that portion of the land and that it was never owned by Brickey; that Drury, under said conveyance, took possession of the north-east end of what is shown by plat No. 1 to be survey 342 and of the tract immediately north-west thereof, which is shown by plat No. 1 to be a continuation of survey 343 but which is averred to be the north-eastern end of survey 342. The answer avers that Linnertz, under the conveyance from Drury to him, took possession of the land Drury had been in possession of under his deed from Brickey, but not all of the said land, because Brickey had, about 1879, forced the possession of Drury southwardly, by infringing upon the possession of Drury and Linnertz by the construction of a ditch which Brickey located and dug on or near the line between surveys 342 and 343 according to the old survey, but which according to the new

survey was on or near the line between 341 and 342. The answer avers that the new survey is correct and respondent does not know whether the land in controversy had previously been supposed to be a part of survey 343, and denies that it is a part of said survey but avers it is a part of survey 342, and denies that complainant is the owner of it. The answer denies that respondent is in full possession of the land sold by Brickey to Drury and by Drury to respondent's father; denies that respondent claims anything in addition to the land bargained and sold by Brickey to Drury and by Drury to respondent's father, and avers that respondent is entitled to the land which complainant alleges was supposed to be a part of survey 343 because it is, in fact, a part of survey 342, and respondent and his grantors were dispossessed thereof by the construction of said ditch by said Brickey.

H. CLAY HORNER, for plaintiff in error.

RICKERT & ZIEBOLD, for defendant in error.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

Which of the surveys is correct is not involved in this suit, as plaintiff in error concedes that the new survey in this action is to be treated as correct. The proof shows that the father of John Drury had built the house designated "old house" on the plats before any conveyance was made by Brickey to his son, John Drury. There is very little contradiction in the evidence. The proof shows that John Drury stated, before he bought from Brickey, that he wanted to build a new house but desired to buy the land from Brickey before doing so, and after procuring the conveyance from Brickey he built the new house just across the road from where the old one was built, and either he or tenants occupied it until he sold to Linnertz. The proof

shows the land occupied by Drury after acquiring the deed from Brickey was that shown in plat No. 1, designated as Drury land, and it was the same land that Linnertz took possession of under his deed from Drury and which defendant in error is now in possession of.

Defendant in error testified that his father and his tenants occupied the new house built by Drury after the conveyance from the latter until his father's death and that the defendant in error is now living in it; that when he bought the land he thought he was buying the land his father, brother and himself had been in possession of up to that time; that that was the land he thought he was paying for; that he still has all of that land, and what he is seeking to recover in the ejectment suit is in addition to it. He testified that neither he nor his father ever had possession of the land lying north-west of the ditch made by Brickey. The ditch appears to have been dug in 1880, and one of the men who helped to dig it testified that Franklin W. Brickey showed them where to dig it and located it with reference to the rock at the Louvier corner; that the elder Linnertz was there at the time and said nothing. The ditch was placed on or near what Brickey claimed to be the line between surveys 342 and 343 but which according to the new survey was between 341 and 342. Previous to the construction of the ditch Drury had possession of a strip eighteen or twenty yards wide north-west of the ditch. Carr, who was a tenant of Drury, testified Drury showed him the lines and told him he thought his north-west fence was over the line on Brickey's land, but said for his tenant to go ahead and cultivate the land to the fence if Brickey didn't object.

From this and other proof it is clear that neither defendant in error nor his father ever had possession of any part of the land in controversy and that Drury never had possession of any part of it except a strip eighteen or twenty yards wide, and he did not claim to own that strip

but said it belonged to Brickey. The case, then, as made by the proof, appears to be that Brickey in 1855 owned surveys 341 and 342 and at that time owned no other land in that neighborhood. Both he and Drury supposing that the north-eastern ends of the said surveys were located as shown by plat No. 1, Drury sought to buy, and Brickey agreed to sell to him, the north-eastern ends of said surveys, containing one hundred acres. The deed describes the land, in part, as extending "as far south to the land heretofore deeded to Eugene Louvier by Franklin W. Brickey" and being a part of surveys 341 and 342. Drury took possession of the land he supposed Brickey conveyed to him as shown by plat No. 1 and built a new house near the south-east line. The facts were, Brickey did not own the tract on which the house was built, (supposedly survey 341,) but the tract on which the house was built was the north-eastern end of survey 662. In addition to it, Drury took possession of the tract adjoining it on the north-west, supposed at that time to be survey 342 but which was, in fact, survey 341. His possession of this latter tract extended up to a few yards beyond its north-west line, and as we understand the evidence this narrow strip beyond the north-west line is all of the land in controversy that Drury ever had possession of and that he never claimed but conceded was Brickey's. Neither defendant in error nor his father ever had possession of any part of the land in controversy.

Plaintiff in error insists that defendant in error now has by the Statute of Limitations an indefeasible title to the north-east end of survey 662, and to allow him a recovery of the land claimed in survey 342 would be giving him that much more land than he ever bought. It is true, as claimed by plaintiff in error, that the minds of Brickey and Drury never did meet on survey 342 as it is shown to exist by the new survey. They had in mind when the negotiations for the purchase and conveyance were made, surveys 341 and

342 as shown by the old survey in plat No. 1. Both parties believing Brickey owned the land shown in plat No. 1, he did not suppose he was conveying, nor did Drury suppose he was buying, survey 342 as shown in plat No. 2.

The question presented is one of some novelty, and we do not find any authority cited in the briefs which sheds much light on it. Under the circumstances shown by the proof, specific performance of the contract to convey survey 342 could not have been enforced, for Brickey did not intend to convey it and Drury had not bargained for it. The deed could not have been reformed so as to describe survey 662, for Brickey did not own it. The only remedy afforded that might have been availed of was rescission, but that remedy, to have been effectual, should have been resorted to in apt time between the parties to the conveyance. The relief sought by the bill in this case is not analogous to rescission, but is more in the nature of the specific performance of the contract of Brickey's grantees to take a tract of land which Brickey did not own in lieu of a tract which he did own and convey. It is not inaptly characterized by counsel for defendant in error to be a suit to enforce a mistake. We are unable to see wherein Brickey has any superior equities to Linnertz. If Linnertz succeeds in his ejectment suit he will still hold such title to survey 662 as he may be entitled to by the Statute of Limitations, also the land in survey 341 by virtue of the conveyance, and in addition thereto survey 342, which he did not know was the land described in his deed and which he has never been in possession of.

Plaintiff in error insists that although the title to a portion of the land Linnertz is in possession of was never conveyed to him by Brickey, as it has become good by lapse of time and he now has as much land, in area, as he contracted for, it would be inequitable to permit him to recover that portion of the land conveyed by Brickey but of which his grantees never had possession, and which Brickey now has in possession and claims still to own notwithstanding

ing he conveyed it in his deed to Drury. In other words, as Linnertz now has as much land as he contracted for, although he did not acquire it through Brickey, he cannot claim the other land which Brickey did convey, because he would then have more land than he supposed he was buying. If Brickey succeeds, it would be to compel Linnertz to take a tract of land under the conveyance made by Brickey which he did not own but to which Linnertz is said to have acquired a good title by the Statute of Limitations, in lieu of a tract conveyed by the deed from Brickey which he did own, and allow Brickey to retain said tract and the consideration paid therefor. The amount of land conveyed by Brickey to Drury and from him to Linnertz was one hundred acres, and presumably Brickey was paid on that basis. As Brickey did not own at least one-half of the land he put Drury in possession of, to now say he may retain practically one-half of the land he conveyed because his grantees acquired title by limitation to enough land he did not own to make up the amount purchased from him, would be to give him the benefit of the consideration paid for land he had no title to and allow him to retain a part of the land conveyed and for which the consideration was paid. The question resolves itself into whether the benefits of whatever title has been acquired by limitation to survey 662 shall be given to Brickey or Linnertz, and we cannot see that Brickey has any such superior equities that it becomes the duty of a court, under the rules and principles of equity, to interfere. Where the equities are equal the law must prevail. (2 Pomeroy's Eq. Jur. sec. 683; 11 Am. & Eng. Ency. of Law, p. 188; 16 Cyc. 138.) A case can be imagined where it might be inequitable to permit a recovery under the circumstances of the recovery sought by Linnertz in this case, but there is no proof in the record of any such circumstances. If Brickey has a valid title to survey 343, no reason appears in this record why he has not as much right to claim the north-east end of it as Linnertz has to

claim the north-east end of survey 342, if his title to it is valid. In that event it certainly could not be contended that equity should protect Brickey's possession of survey 342, and the bare fact that such is a possibility tends to show that he is not entitled to the relief asked in this case.

In our opinion the circuit court did not err in dismissing the bill, and its decree is affirmed.

Decree affirmed.

THOMAS B. LONERGAN, Appellant, *vs.* HARRY GOODMAN
et al. Appellees.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

EQUITY—*what is not proper use of a court of equity.* A party cannot maintain a bill to enforce an alleged option to purchase premises from the holder of the legal title where there is no averment that he has offered to make the payment entitling him to enforce the option, and the only apparent purpose of the bill is to use the court, for business reasons, to decide what kind of a title the complainant will take if he complies with the terms of the option, there being no real controversy between the parties and no issue of fact raised by the pleadings.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

MASON & WYMAN, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, and ARTHUR B. SCHAFFNER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellant, Thomas B. Lonergan, filed his bill in the circuit court of Cook county, making the appellees, Harry Goodman and Blanche L. Goodman, his wife, de-

defendants, and praying the court to appoint a trustee and invest such trustee with title to lot 7 in lot 1, in block 18, of the original town of Chicago; that an option given by the defendant Harry Goodman to the complainant for the purchase of said lot should be enforced and the premises should be sold and the proceeds invested by the trustee and the rights of all parties in the proceeds preserved. The defendants filed a plea which was set down for argument and sustained, and the complainant electing not to reply to the plea but admitting the truth of the allegations therein contained, the bill was dismissed for want of equity at his costs, and he appealed.

The following facts were set forth in the bill: Thomas Lonergan died on March 24, 1894, leaving a last will and testament, and leaving Mary A. Lonergan, his widow, and complainant, Thomas B. Lonergan, Charles J. Lonergan, Eugenie E. Spearman, Mary C. Lilly, Blanche L. Davis and Maude M. McLaughlin, his sons and daughters and only heirs-at-law. By his will he devised a life estate in all his real estate to his widow, and devised to the complainant a life estate, after her death, in said lot 7, with remainder in fee simple absolute, after the death of complainant, to the heirs of his body, but in the event of the death of complainant without lawful issue of his body the remainder was devised, share and share alike, to the said Eugenie E. Spearman, Mary C. Lilly and Blanche L. Davis, and to their heirs and assigns forever. The lot has a frontage of twenty feet on Clark street and a depth of eighty feet, and at the death of the testator it was improved by a three-story brick building, and the premises were rented at that time for \$400 per month. The widow died on November 12, 1895. On May 7, 1896, Eugenie E. Spearman, Mary C. Lilly and Blanche L. Davis joined in a special warranty deed purporting to convey said lot to the complainant. On October 3, 1899, the complainant executed a trust deed conveying said lot as security for the payment

of a note for \$12,000, and a bill has been filed to foreclose the same. About the year 1900 a judgment was entered against the complainant and his interest was sold for a small sum, and a sheriff's deed was afterward made to the defendant Harry Goodman, who still holds the title. About November 13, 1901, the complainant became indebted in the further sum of \$14,000, and Harry Goodman has agreed to convey the premises to the complainant on payment of amounts aggregating about \$15,000, within two years from July 30, 1908. The complainant is thirty-five years old, has never been married and is not contemplating marriage. The assessed value of the lot at the death of the testator was \$25,000 and is now \$60,000. For more than eight years the rental value has been decreasing yearly and it has become more and more difficult to rent the premises, and for more than five years neither the second nor third story of the building has been rented. The first story is rented for a dram-shop at \$150 per month. The building is more than thirty years old, dilapidated and poorly constructed, and for more than eight years the income has barely paid the taxes, assessments, insurance and expenses of managing and keeping in repair. The bill sets forth that it was the intention of the testator that the property should yield income to the life tenant, but that it does not yield any income, and the premises will be sold for taxes, the title lost and the object of the will defeated unless a trustee shall be appointed and the premises sold.

The plea which the court sustained is, in substance, exactly the same as the bill and raises no issue of fact whatever. It avers the death of Thomas Lonergan, the heirship, the terms of the will, the death of the widow, and the other facts, the same as they are set forth in the bill. There are some additional averments not material to the decision of any question involved in the case. The plea sets forth the will of Thomas Lonergan *in hac verba*, and avers that on April 5, 1894, Mary C. Lilly and husband, Blanche L.

Davis and husband, Eugenie E. Spearman and husband, and Mary A. Lonergan executed a quit-claim deed to the complainant of the lot; that on May 7, 1896, after the death of the widow, Eugenie E. Spearman and husband, Mary C. Lilly and husband and Blanche L. Davis and husband executed their special warranty deed to the complainant, as alleged in the bill; that on or about the same day Maude M. McLaughlin and husband and Charles J. Lonergan and wife executed their special warranty deed to the complainant of the said lot; that at the April term, 1900, of the circuit court of Cook county a judgment for \$390 and costs was recovered against complainant and an execution was issued and the lot was sold for \$380; that the defendant Harry Goodman acquired the certificate of purchase and obtained a sheriff's deed; that the said Harry Goodman, on July 30, 1908, agreed to convey said premises to the complainant at any time within two years, on the payment by the complainant of the sum of \$14,898.67, with interest thereon at the rate of five per cent from November 13, 1901, and that the complainant has never offered to pay said sum or any part thereof.

Counsel on both sides have argued questions as to the nature of the remainders after the life estate of the complainant and whether the contingent remainder to heirs of the body of the complainant who may come into being hereafter has been merged in the fee, under the doctrine of the case of *Bond v. Moore*, 236 Ill. 576, so that Harry Goodman is now invested with the full and complete title. They say that the circuit court entertained the view that the contingent remainder to unborn children has been merged in the fee, and they seek for a decision of that question. It is assumed that the bill states a case coming within the rule adopted in *Gavin v. Curtin*, 171 Ill. 640, and the case has the form of a litigation on that subject, but it lacks the necessary condition that the complainant should be entitled to maintain the bill. He is not the owner of the life es-

tate in the lot devised to him or any other title or interest therein, but has only an option to purchase the premises from the defendant Harry Goodman within a certain time upon payment of a certain price. In his prayer he asked that his option be enforced, but he did not allege that he had performed or offered to perform on his part or that Harry Goodman had refused to comply on his part, and the plea sets up the option and alleges that the complainant has never paid or offered to pay anything under it. Whether the complainant will ever acquire any title to the lot depends upon his payment of the purchase price within the time agreed upon, and the only possible effect of a decision of the question discussed by counsel would be to have this court certify what title Harry Goodman now has and what title the complainant will acquire if he chooses to avail himself of the option. The bill states all the facts upon which the question of title depends and the plea merely reiterates the same facts with immaterial additions, so that there appears to be no real controversy between the parties, and a court cannot properly be used, for mere business reasons, to decide whether the complainant will get an absolute estate in fee on complying with the terms of the option, or a limited estate. If the statement of counsel as to the views entertained by the circuit court is correct it is not material and the court did not commit any error in dismissing the bill. The complainant has no right to ask the court to appoint a trustee so that he may derive income from the property or the proceeds, when he has no right or title in the property and no right to income.

The decree is affirmed.

Decree affirmed.

RICHARD YEATES, Appellee, *vs.* THE ILLINOIS CENTRAL
RAILROAD COMPANY, Appellant.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. **BRIEFS**—*appellee's brief should be a reply to points made by appellant.* Under the rules of the Supreme Court the brief and argument for the appellee should be a reply to the points made by the appellant and the argument should follow the order of their presentation, so that the court may get the points made by the appellant, with the answers thereto, in intelligible form.

2. **MASTER AND SERVANT**—*duty of master to make rules—effect of an established custom.* It is the duty of a master conducting a business with different branches to make, publish and enforce reasonable rules and regulations to promote the safety of servants, but in the absence of any rule governing a particular situation it is proper to consider the existence of an established custom with respect thereto.

3. **SAME**—*when relation of master and servant exists.* The relation of master and servant exists where the employer has the power to direct what work the employee shall do and the manner in which it shall be done and has the power to remove and discharge him.

4. **SAME**—*when switch tender hired by one railroad company is not servant of another.* A switch tender who is employed and controlled by one railroad company is not the servant of another company for whose trains he throws the switch under a trackage arrangement between the two companies, where the latter company has no control over him other than to complain to his employer of the manner in which he performs his duties, although it re-imburses his employer for a fixed part of his wages.

5. **NEGLIGENCE**—*person is bound to anticipate results naturally following his acts.* A switch tender who violates an established custom by letting a switch engine of another railroad company in upon a certain switch track without waiting for a road engine to back out or warning the switch crew of its presence, is bound to anticipate, as a natural result of his act, that the switch engine will proceed up the track, and if a collision between the switch engine and the road engine occurs as the proximate result of his negligence, his employer is liable to the injured members of the switch crew.

6. **SAME**—*what is proximate cause of an accident.* The nearest independent cause which is adequate to produce and does bring

about an accident is the proximate cause of the same and supercedes any remote cause.

7. *SAME—what tends to show negligence by a switch tender.* The violation of a practically uniform custom by a switch tender by which a switch crew were misled and in consequence of which they encountered a danger they had no reason to expect, tends to prove negligence on his part.

8. *SAME—fact that injury is partly due to negligence of fellow-servant does not preclude recovery.* If an injury to a switchman is wholly due to the negligence of members of the crew who are his fellow-servants he has no cause of action against anyone; but if the negligence of a person not his fellow-servant is the proximate cause of the injury, the fact that the negligence of his fellow-servants concurred with such person's negligence in producing the injury does not preclude a right of recovery.

9. *INSTRUCTIONS—when instruction need not state meaning of fellow-servants.* An instruction stating that if the jury believe, from the evidence, that a certain switch tender was the servant of the defendant railroad company and was not under the direction and control of another railroad company, and that the plaintiff was the servant of the latter company and not under the direction or control of the defendant, then the plaintiff and the switch tender were not fellow-servants, is not erroneous in failing to further inform the jury of the meaning of fellow-servants, in the law.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

CALHOUN, LYFORD & SHEEAN, (JOHN G. DRENNAN, of counsel,) for appellant.

JAMES C. McSHANE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from a judgment of the Branch Appellate Court for the First District affirming a judgment of the circuit court of Cook county for \$22,500 in favor of appellee and against appellant on account of injuries re-

ceived in a collision between a switch engine of the Michigan Central Railroad Company, upon which the appellee, a member of the switch crew, was riding, and a road engine of the same company, necessitating the amputation of both of appellee's legs above the knees.

A brief for appellant was filed presenting three grounds relied upon for a reversal of the judgment: First, that the trial court erred in refusing to direct a verdict of not guilty; second, that the court erred in refusing to set aside the verdict, because it showed that the jury did not consider a covenant not to sue the Michigan Central Railroad Company; and third, that the court erred in giving to the jury instructions numbered 4 and 6 at the request of appellee. This brief was followed by an argument discussing and elaborating the points contained in the brief, and both were in accordance with the rule of this court. That rule required the appellee to file a brief containing a short and clear statement of the propositions by which counsel sought to meet the alleged errors and sustain the judgment, which brief might be followed by an argument confined to discussion and elaboration of the points contained in the brief. Instead of complying with the rule, counsel for appellee filed what is called a statement, brief and argument, giving no attention to the questions raised or the errors alleged or the order of their presentation, but constituting a sort of treatise on the facts and law applicable to this and similar cases and presenting the views of counsel on every subject that might have been involved in the appeal. It is needless to say that the rule should be complied with and the brief and argument for appellee should be a reply to the points made for the appellant, and the argument should follow the order of their presentation, so that the court may get the points made by the appellant, with the answers thereto, in some intelligible form.

The amended declaration contained seven counts, but on the trial the jury were instructed to disregard the third,

fifth, sixth and seventh and the cause was submitted on the first, second and fourth.

The ground upon which the defendant was charged with liability was that a switch tender in its employ threw a switch and signaled and permitted a train drawn by the switch engine on which plaintiff was riding to run north upon a track at a time when said switch tender knew, or by the exercise of ordinary care would have known, that the road engine was liable to be backing south.

The facts not in dispute at the trial are as follows: From Kensington, south of Chicago, the trains of the Michigan Central Railroad Company come into the city over the defendant's tracks to Harrison street. At that point there is a diamond switch, operated by a switch tender employed and paid by the defendant, but the defendant is reimbursed to the extent of one-third of his wages by the Michigan Central Railroad Company. The switch tender throws the switches and controls the movements of trains passing that point. The switch leads to two tracks, numbered 5 and 6, running north to about Adams street, which the Michigan Central Railroad Company holds under a perpetual lease. From Adams street the yards of the Michigan Central Railroad Company extend north to South Water street and are owned by that company in fee. No. 5 is the west track, and the usual method is for a train coming in from the road to be let in by the switch tender on track No. 5. After the train has pulled in so as to clear track No. 6, the engine is detached and crosses over to track No. 6 (the east track) and backs south to the round-house, at Sixteenth street. A switch engine then comes south from the yards on No. 6 and pushes the train up into the yards. On the morning of December 12, 1903, at about 8:30, a Michigan Central freight train came from the south to the diamond switch and was let in by the switch tender on track No. 5. The train stopped and the brakeman uncoupled the engine, according to the custom, and the engine passed over to

track No. 6 and started to back south on its way to the round-house. Just after the freight train had pulled in on track No. 5 the switch engine, on which the plaintiff was the forward switchman, came north and stopped south of the switch, drawing seven or eight cars. There was a heavy snow falling, which prevented seeing any object at a distance. When a train went north on track No. 6 it was the practice to proceed carefully, with the engine and train under full control, as switch engines might be expected at any time coming south on that track, but it had been a regular custom for the switch tender to hold out all engines and trains until the road engines that had hauled trains in had uncoupled from their trains and backed south over track No. 6 on the way to the round-house, which was ordinarily not more than five minutes. The only exception was in case the road engine was delayed at the north end of the yards for a considerable time, which occasionally happened, when the switch tender would allow engines or trains to go north upon track No. 6 after first informing their crews that the road engine was still up in the yards. None of the switch train crew at this time knew that the freight train had pulled in on track No. 5, and after waiting a few minutes for a signal the switch tender signaled the train to come ahead and threw the switch. The switch crew did not know what track they were to take, but when they turned the curve into track No. 6 they saw that there was a freight train standing on track No. 5, but they did not know that the road engine had not come out. The switch engine proceeded slowly north, with the bell ringing and with a lookout for switch engines which might be coming south on the track. It was impossible to see any distance, and when the switch engine reached the Jackson street viaduct there was also a great deal of smoke and steam from one of the defendant's switch engines standing there. The road engine was backing, without the bell ringing, at a rate estimated from six to twelve miles an hour

and the crews could not see each other more than a car length, so that a collision occurred and the plaintiff lost both of his legs. There was a dispute at the trial between the switch tender and the members of the switch crew in this: The switch tender testified that when the engine was passing he shouted to them, "Go up No. 6; I am letting you up the wrong main; go up there easy;" but the members of the switch crew denied that they heard anything of the kind.

The grounds upon which it is argued the court ought to have directed a verdict are, that the switch crew knew that they might meet a switch engine at any time, and when they saw the freight train standing on track No. 5 they also knew that they might meet the road engine; that if the act of the switch tender was negligent it was not the proximate cause of the accident, for the reason that the switch crew were aware of probable danger and proceeded slowly and cautiously for two blocks in anticipation that they might meet an engine; that negligence of the switch crew, after they found the freight train on track No. 5, without flagging ahead or being prepared to at once back up, broke the connection between the switch tender's act and the collision, and that negligence on the part of the road engineer was the cause of the accident and was an independent, intervening, efficient cause of the plaintiff's injury. The evidence was, that there was a uniform custom on the part of the switch tender to hold out engines going north and not let them go upon the track until the road engine had come out; but it is insisted that the custom was not binding on the defendant because it was not the result of any rule promulgated by it, and when the switch crew saw the train on track No. 5 they were bound to anticipate a probable meeting with the road engine. It is the duty of a master conducting a business with different branches, to make, publish and enforce reasonable rules and regulations to promote the safety of servants, and no

rule was ever made or published by the defendant governing the movement of trains at this switch. There was no rule of the defendant on the subject, but in considering the question whether the act of the switch tender was negligent and whether the switch crew ought to have anticipated meeting the road engine it was proper to consider the existence of the custom. (*St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288; *Chicago, Rock Island and Pacific Railway Co. v. Rathneau*, 225 id. 278.) The violation of a practically uniform custom tended to prove negligence on the part of the switch tender, by which the switch crew were misled and in consequence of which they encountered the danger which they had no reason to expect. Crews of switch engines proceeded cautiously in view of the possibility of meeting, but there was evidence tending to show that road engines had the right of way and did not look out for switch engines. It was necessary to prove that the negligence charged was the proximate cause of the injury, and the nearest independent cause which is adequate to produce and does bring about an accident is the proximate cause of the same and supersedes any remote cause. (*Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Seymour v. Union Stock Yards Co.* 224 id. 579.) The court could not say that any negligence of the switch crew or the engineer of the road engine broke the connection between the switch tender's act and the collision, if there was any negligence on the part of either crew or engineer. Every one is bound to anticipate the results naturally following his own acts, and the fact of the switch crew going north on track No. 6 was a consequence of the wrongful act of the switch tender which he necessarily anticipated. The injury was not disconnected from the primary cause by some other independent and efficient cause, and even if the engineer of the road engine or the switch crew were guilty of negligence it would not relieve the defendant from liability. If the switch tender was free from negligence there would, of

course, be no liability of the defendant, as it was not responsible for any negligence of servants of the Michigan Central Railroad Company. The court could not say, as a matter of law, that the switch tender was not negligent or that his negligence was not the proximate cause of the injury, and therefore the court did not err in refusing to direct a verdict.

It is next contended that the court erred in refusing to set aside the verdict, because it showed that the jury did not consider the covenant not to sue the Michigan Central Railroad Company which was introduced in evidence. It is not contended that the covenant not to sue one joint tortfeasor would prevent an action against the other, although that question is argued on the other side as though it was a matter to be decided, but the point made is, that the covenant included the defendant because either it or the switch tender was an employee of the Michigan Central Railroad Company for the purpose of operating the switch. Neither the defendant nor the switch tender was a servant of the Michigan Central Railroad Company. The relation of master and servant exists where the employer has the power to direct what work the employee shall do and the way and manner in which it shall be done and has power to remove and discharge him. (*Grace & Hyde Co. v. Probst*, 208 Ill. 147; 20 Am. & Eng. Ency. of Law,—2d ed.—12; 26 Cyc. 963; Wood on Master and Servant, sec. 1.) The switch tender was employed by and was under the control of the defendant, and the only thing the Michigan Central Railroad Company could do would be to make complaint to the defendant of the manner in which he discharged his duties, or to insist that the defendant, through its servant, should perform them differently.

The fourth instruction given at the request of plaintiff was as follows:

"The court instructs the jury that even if you believe, from the evidence, that the engineer or fireman of the

switch engine or the conductor of the switching crew in question were guilty of negligence which contributed towards or helped to cause the collision in question, still if you further believe, from the evidence, that the plaintiff did not in any way induce, cause or contribute to such negligence, if any, upon the part of the said engineer, fireman or conductor, then such negligence, if any, upon the part of said engineer, fireman or conductor cannot be charged against or imputed to the plaintiff in this suit, provided the plaintiff was himself, before and at the time of the collision in question, exercising ordinary care for his own safety."

This instruction, as applied to this case, was incorrect, and standing alone would have been misleading. The negligence of a driver of a vehicle not under the control of the person injured is not to be imputed to him. (*Chicago Union Traction Co. v. Leach*, 215 Ill. 184.) But that rule of law had nothing to do with this case. So far as the switch crew were concerned they were fellow-servants of the plaintiff, for whose negligence he would have no cause of action against anyone. If the defendant was guilty of negligence which was a proximate cause of the collision, the fact that negligence of the plaintiff's fellow-servants of the switch crew or of the engineer of the road engine concurred with the negligence of the defendant would not excuse it and would make no difference. (*Monmouth Mining and Manf. Co. v. Erling*, 148 Ill. 521; *Chicago and Northwestern Railway Co. v. Gillison*, 173 id. 264; *Pullman Palace Car Co. v. Laack*, *supra*.) The instruction was not applicable to the case. If the defendant was not guilty of negligence and the switch crew or road engineer were guilty of negligence causing the collision the plaintiff could not recover in any event. The instructions, however, are all to be regarded as a single charge and to be read together, and we do not think that the jury were misled by instruction No. 4. The second instruction given for the plaintiff advised the jury that he could not recover

on account of any negligence of the Michigan Central Railroad Company's servants in charge of the operation or management of the road engine, or of its servants in charge of the operation or management of the switch engine, or on account of any negligence on the part of said railroad company. The defendant's instruction N informed the jury that if they believed, from the evidence, that the only direct and proximate cause of the injury was negligence upon the part of employees of the Michigan Central Railroad Company they should find the defendant not guilty, and instruction O stated that if the engineer of the switch crew was guilty of negligence in the manner in which he proceeded along track No. 6 under the conditions which then obstructed his view ahead, and that such negligence was the only direct and proximate cause of the collision, they should find the defendant not guilty. These instructions were correct and accurate statements of the law, and we do not see how the jury could have applied instruction No. 4 to the injury of the defendant.

Instruction No. 6 concerned the relations of the switch tender to defendant, and stated that if the jury believed, from the evidence, that he was the servant of the defendant and was not under the direction or control of the Michigan Central Railroad Company, and if the plaintiff was the servant of the Michigan Central Railroad Company and was not under the direction and control of the defendant, then the plaintiff and the switch tender were not fellow-servants. It is not contended that the instruction was an incorrect statement of the law, but the objection is that it was given without informing the jury of the meaning of fellow-servants in the law,—in other words, that a statement of what servants were not fellow-servants would not be good without a further statement as to what servants would be fellow-servants. If the defense rested upon the fact that certain persons were fellow-servants of the plaintiff, the defendant had the privilege of asking an instruc-

tion bringing such persons within the rule, and that was practically done by instruction L, given at the request of the defendant, which, without using the term, stated the legal effect. The court did not err in failing to include in instruction No. 6 a statement what would constitute fellow-servants.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

HELEN T. PELOUZE *et al.* Exrs., Appellants, *vs.* HARRISON B. SLAUGHTER, Exr. *et al.* Appellees.

Opinion filed June 16, 1909—Rehearing denied October 6, 1909.

1. APPEALS AND ERRORS—*error cannot be assigned on opinion of Appellate Court.* Error cannot be assigned on the opinion of the Appellate Court, and if the judgment of the Appellate Court is correct it will not be reversed even though the Supreme Court does not agree with the reasons given for the correct decision.

2. SAME—*duty of a party obtaining affirmative relief.* A party obtaining affirmative relief by a decree must preserve the evidence upon which it is founded, either by a certificate of evidence or by a recital of facts in the decree.

3. SAME—*a party obtaining decree has no right to appeal from its findings.* A party who obtains a decree in full accordance with his claims has no right to appeal from findings of the court embodied in the decree.

4. SAME—*purpose of statutory assignment of cross-errors.* The purpose of the statutory assignment of cross-errors is to enable the court of review to finally decide the controversy without necessitating a separate appeal or writ of error.

5. SAME—*rule as to necessity for assigning cross-errors.* Except as a matter of practice, where an appellee or defendant in error desires alleged errors against him to be corrected upon a second trial in case the judgment is reversed, an assignment of cross-errors is only required where appellee or defendant in error seeks a reversal of the decree or judgment in some particular and might have appealed or sued out a writ of error to obtain such reversal.

6. SAME—*appellee may sustain decree on any facts in the record without assigning cross-error.* An appellee or defendant in error has a right, without assigning cross-errors on the findings

of the decree, to sustain the decree upon any facts in the record, whether they are the same as those found by the decree or not, and may in like manner sustain the judgment of the Appellate Court whether the reasons given in the opinion are good or not.

7. GAMBLING CONTRACTS—*the party asserting that transactions were gambling ones has the burden of proof.* Executors who file a bill in equity, under section 132 of the Criminal Code, against stock brokers have the burden of proving the allegations of their bill that the sales and purchases of stocks made by the defendants for their testatrix were gambling transactions.

8. SAME—*when broker is a "winner," under section 132 of the Criminal Code.* Under section 132 of the Criminal Code a broker is liable as a "winner" for losses of his customer if there was an understanding between them that there was to be a settlement between them on differences, only, and that there was to be no right on the part of the customer to demand and receive the stocks or any obligation to take or pay for them; but it must appear that both parties had the intention of settling on differences, only.

9. SAME—*what does not justify the inference that stock transactions were gambling ones.* The fact that the purchases and sales of stocks made by brokers for a customer were of great magnitude in proportion to the wealth of the customer does not justify an inference of an intention to settle on differences, only, where there is no proof of such intention and where the stocks were actually sold and delivered or received and paid for by the brokers, and there was no time when the customer could not have paid the balance due if the value of the stocks were taken into account.

10. SAME—*sales and purchases by broker under general order are not necessarily gambling transactions.* The fact that sales and purchases of stocks are made by a broker under a general order to use his own discretion in buying and selling, without a specific order from his customer, does not make the transactions gambling ones, where each purchase or sale was reported to the customer and ratified by her on the day it was made, and where there is no proof of any intention to settle on differences, only.

11. SAME—*when section 132 of Criminal Code does not apply.* Where, at the time of the death of a person who has been buying and selling stocks through a broker, the account stands with a profit in favor of the customer, losses subsequently occurring to the estate through the depreciation in value of stocks during the time they were under the control of the executors cannot be recovered by the executors from the broker under section 132 of the Criminal Code, upon the theory that the original purchases of the stocks were gambling transactions.

HAND, J., dissenting.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. J. W. MACK, Judge, presiding.

WILLIAM E. O'NEILL, and MORRIS ST. P. THOMAS, for appellants:

Gambling in stocks is illegal, and the loser is entitled to recover his losses from the winner by action at law or bill in equity. Whether the transactions are wagers is to be determined from a consideration of all the facts and circumstances. *Crim. Code*, sec. 132; *Jamieson v. Wallace*, 167 Ill. 388; *Pardridge v. Cutler*, 168 id. 504; *Pearce v. Foote*, 113 id. 228; *Cothran v. Ellis*, 125 id. 496; *Booth v. People*, 186 id. 43; *Commission Co. v. People*, 209 id. 528; *Bartlett v. Slusher*, 215 id. 348; *Carroll v. Holmes*, 24 id. 453; *Miles v. Andrews*, 40 id. 155; *Irwin v. Williar*, 110 U. S. 499; *Sharp v. Stalker*, 63 N. J. Eq. 596; *Cashman v. Root*, 12 L. R. A. 511; *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Stewart v. Schall*, 65 Md. 289; *Gregory v. Wendell*, 39 Mich. 337; *North v. Phillips*, 89 Pa. St. 250; *Ruchizky v. DeHaven*, 97 id. 202.

The object sought to be accomplished by section 132 of the Criminal Code cannot be defeated by resort to the equitable doctrines relating to *laches*, acquiescence, ratification or estoppel, or by any supposed application of the maxim that he who seeks equity must do equity. If the transactions in question were gambling transactions they were void by the express language of the statute, and could not be rendered valid by acts or conduct of the parties. 2 Pomeroy's Eq. Jur. sec. 964, and note; 1 Story's Eq. Jur. secs. 306, 345; 2 Beach on Contracts, secs. 1499, 1453.

In the absence of the statute, equity would not have entertained this bill. 2 Pomeroy's Eq. sec. 938; *Petillon v. Hipple*, 90 Ill. 420; *Inhabitants v. Eaton*, 11 Mass. 369; *Lord St. John v. Lady St. John*, 11 Ves. Jr. 526; *Hershey*

v. *Weitung*, 50 Pa. St. 240; *Goble v. O'Connor*, 43 Neb. 49; *McCredie v. Buxton*, 31 Mich. 383; *Bleakley's Appeal*, 66 Pa. St. 187; *Lyons v. Cole*, 117 Mass. 382.

At the time the bill was filed the transactions in question were executed gambling contracts. *Jamieson v. Wallace*, 167 Ill. 388.

The statute under which the bill was brought is penal, and not remedial. *Kizer v. Walden*, 198 Ill. 274; *Robson v. Doyle*, 191 id. 566; *Hearst case*, 95 Fed. Rep. 656.

JACOB NEWMAN, HIRAM T. GILBERT, and JOHN J. HERRICK, for appellees:

A stock broker who also lends money to his customers and holds as security the stocks purchased, is, in fact, a banker who, in addition to his business of banking, attends to the purchase and sale of stocks for his customers. He is entitled to same protection from the courts as any banker or lender of money. *Peter v. Grimm*, 149 Pa. St. 163.

Even if a purchase of stocks might otherwise be regarded as a gambling transaction, it becomes legitimate and enforceable if, after the purchase is made, the person for whom it is made agrees to accept delivery. *Anthony v. Unangst*, 174 Pa. St. 10.

That principle is decisive of the case at bar. After Mrs. Thompson's death there were no new purchases of stocks by the complainants, but they demanded and received delivery of a portion of the stocks on hand, assumed control over the remaining stocks, and conclusively evidenced a claim, on their part, of a right to demand delivery and exercise dominion over all of the stocks.

The maxim "He who seeks equity must do equity" prohibits the complainants, in any event, from recovering the city railway and the Atchison preferred stock without first paying, or offering to pay, back the money received by Mrs. Thompson, with interest. *Mumford v. Trust Co.* 4 N. Y.

463; *Chapin v. Dake*, 57 Ill. 295; *Thompson v. Williamson*, 58 Atl. Rep. 602.

The court in this case is proceeding in the exercise of its ordinary equity jurisdiction, and not by virtue of a special power conferred upon it by statute. *Petillon v. Hipple*, 90 Ill. 420.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Medora Gale Thompson died on February 14, 1902, and seventeen months afterward the appellants, as executors of her last will and testament, filed the bill in this case in the circuit court of Cook county against appellees to recover the possession of certain stocks held by appellees, or the value of the same, on the ground that such stocks were received by virtue of gambling transactions carried on between said Medora Gale Thompson and the appellees from January, 1896, to the time of her death. The appellees filed an answer denying that the transactions between them and Medora Gale Thompson were gambling transactions, and alleging that at the time of her death she was indebted to them in a large sum of money, for which they held as security shares of stock purchased by them for her which could readily have been sold at that date for \$169,000, and also 225 shares of Chicago City railway stock deposited with them by her; that at the time of her death the appellants had full knowledge of the transactions and the nature of the same, and that the appellants, as executors, at different times ordered the sale and delivery of the stock so purchased and held by appellees. After the filing of the bill the appellees sold at public sale, on notice to the appellants, the stocks then in their hands, except 49 shares of Chicago City railway stock, and applied the proceeds on the indebtedness to them, which reduced it to \$13,714.34, and they afterward filed a cross-bill to enforce a lien against said remaining stocks for the indebtedness. The cross-bill

was answered, with a denial that the appellants were indebted in the sum of \$13,714.34, as charged in the cross-bill, or that the appellees had any right to the 49 shares of the Chicago City railway stock as security for the same.

The facts were not in dispute, and are, in substance, as follows: The appellees, as members of the firm of A. O. Slaughter & Co., or its successor, A. O. Slaughter, Jr. & Co., were engaged in business in Chicago in the purchase and sale of stocks, bonds and other securities on commission, and loaning money. In 1896 Mrs. Thompson, who was a widow of mature age, personally managing her own business and worth somewhere about \$250,000, commenced to give orders to the appellees to buy such stocks for her as she from time to time desired to purchase. An arrangement was made by which they let her have money for the purpose of making the purchases, and she deposited with them, from time to time, securities to protect them against loss in the purchases and sales, and they let her have money, for which she agreed to pay interest at rates agreed upon from time to time. She ordered purchases of certain stocks, and her orders were carried out and reports made to her the same day. When she chose to sell she gave an order for a sale, and it was made and reported to her in like manner. About September 30, 1898, she authorized certain members of the firm to buy and sell stocks for her as before, but without specific orders and on their own judgment. The business was carried on up to her death in the same manner as before, except that the purchases and sales were made under that arrangement, and each purchase and sale was reported to her the same day that it was made and was ratified and confirmed by her. The stocks were bought in Chicago and New York, but almost wholly in New York, and in every instance they were actually bought and paid for and delivered. The appellees had correspondents in New York who were members of the stock exchange and would wire a correspondent to buy certain stocks. The

correspondent thereupon bought the stocks for cash, and the certificates were delivered to the purchaser the next day by 2:15 P. M. and the purchase price was paid. The price was charged to the appellees on the books of the New York firm, and when sales were made the selling price was received and credited to the appellees. If a sale of stocks not on hand was made, the stocks were borrowed to make delivery to the buyer and a check was given to the lender for the market value, and when such stocks were bought the certificates were received and paid for and delivered to the person from whom the stocks were borrowed. Every transaction was actual, *bona fide* and for cash, and the certificates were received and held by the New York correspondents for the appellees, ready to be delivered upon payment. The appellees, upon receipt of each statement from the New York correspondent, charged Mrs. Thompson with the amount of the purchase or credited her with the amount of the sale, and their only interest was the commissions for attending to the business and interest on money advanced to her. In addition to the report of each purchase and sale, the appellees, at the end of each month, sent Mrs. Thompson a statement of her account showing the stocks on hand, their market value, the condition of the account and the balance due them. She acknowledged the receipt of each statement down to November 30, 1901, which was acknowledged by her daughter, Helen T. Pelouze, one of the appellants, for her. Each letter acknowledging the receipt of a statement stated that the account had been examined and found correct, and each statement contained this: "All orders for the purchase and sale of any article are received and executed with the distinct understanding that actual delivery is contemplated and that the party giving the order so understands and agrees." At the death of Mrs. Thompson the balance of the account against her was \$199,411.48, and appellees had on hand stocks of the value of \$173,000, and also 225 shares of Chicago City railway

stock which had been deposited with them by Mrs. Thompson. On the whole series of transactions there was a profit to her. After her death, at various times, the appellants directed the appellees to sell certain of the shares and to deliver other shares to certain brokers in New York and receive payment for the same. The appellants in that way disposed of all the stocks on hand at the death of Mrs. Thompson except 2100 shares of Union Bag and Paper, which was of the value of \$36,000 at her death. Appellants also deposited with the appellees, as security, certain stocks, and after the bill was filed the appellees sold the stocks, except 49 shares of Chicago City railway stock, at auction, as before stated, by which the indebtedness was reduced to \$13,714.34.

The master reported the evidence, with his conclusions that all the transactions were a continuous series and were legitimate speculations and not gambling transactions, and that the appellants were not in a position, at the time of filing their bill, to claim the benefit of section 130 of the Criminal Code, which is the section prohibiting options. He recommended that the bill of complaint be dismissed for want of equity and that the prayer of the cross-bill be allowed. The cause was heard on exceptions to the report, and the court modified it by dividing the transactions between Mrs. Thompson and the appellees into three periods: The first, from their commencement to February 15, 1897; the second, from February 23, 1897, to September 30, 1898; and the third, from the latter date to her death. The court entered a decree reciting that the transactions down to September 30, 1898, were legitimate and that the transactions after that date were gambling transactions, but that the conduct of appellants as executors, and the course of dealing between them and the appellees from the death of Mrs. Thompson to the commencement of this suit, were such as to constitute a new contract between the appellants and appellees, by which the appellants were precluded from

receiving the benefits which might otherwise have accrued to them under the statutes respecting gambling. The court adopted the recommendation of the master but on different grounds, and dismissed the original bill for want of equity and granted the relief prayed for in the cross-bill. From that decree appellants removed the cause by appeal to the Appellate Court for the First District, and the branch of that court affirmed the decree.

In giving the reasons for an affirmance of the decree the Appellate Court stated that the appellants, knowing that the appellees held shares of stock of the market value of \$180,000 at the death of Mrs. Thompson which they claimed to have bought for her, disposed of four-fifths in value of said stocks. The court expressed no opinion on the question whether such action fixed the character of the transactions or amounted to a new contract, but did express the opinion that the transactions were legitimate and not gambling transactions, which was conclusive of the case. The appellees did not assign cross-errors in the Appellate Court, and counsel for the appellants, pointing to the opinion, say that the appellees are precluded in this court from insisting that the transactions were legitimate. Their argument is, that the appellees not having assigned cross-errors in the Appellate Court, that court could not consider any question except whether gambling transactions could be ratified or confirmed by what the appellants did, and that the appellees cannot support the judgment of the Appellate Court except upon that ground. While the opinion of the Appellate Court shows the reasons which influenced that court to affirm the decree, it is the judgment, and not the opinion, of the Appellate Court that is under review now. Error cannot be assigned on the opinion, and the judgment could not be reversed if we should be unable to agree with reasons given for a correct decision. (*Pennsylvania Co. v. Keane*, 143 Ill. 172.) The decree of the circuit court dismissed the original bill for want of equity and gave to the

appellees the relief prayed for in the cross-bill. The reasons upon which that decree were founded were, that while the transactions subsequent to September 30, 1898, were gambling transactions, the appellants had so dealt with the stocks as to constitute a new and valid contract. It was not necessary that the decree should contain findings of fact, but a party obtaining affirmative relief must preserve the evidence upon which it is founded, either by a certificate of evidence or a recital of facts. If the evidence had been preserved by a certificate of evidence there could have been no assignment of cross-errors, and the appellees, who had obtained a decree in accordance with their claims, could not appeal from findings of the court embodied in the decree. *Corning v. Troy Iron Co.* 15 How. 451.

The purpose of the statutory assignment of cross-errors is to enable the court to finally decide the controversy without necessitating a separate appeal or writ of error. Formerly there was no right to assign cross-errors, but any party deeming himself aggrieved by a judgment or decree was compelled to take an appeal or sue out a writ of error. An appellee or defendant in error was not allowed to assign cross-errors except with the consent of the appellant or the plaintiff in error. (*Smith v. Sackett*, 15 Ill. 528.) In *Carter v. Moses*, 40 Ill. 55, the appellee asked leave to assign cross-errors, but the court said that in a chancery case an appeal brought the whole case before the court and it would be considered upon its merits without the assignment of cross-errors. In any case a party was permitted to prosecute a writ of error although the opposite party had appealed from the same judgment, and one of the proceedings did not affect the other but both might progress at the same time. (*Harding v. Larkin*, 41 Ill. 413.) In 1869 an act was passed which provided that the appellee or defendant in error should have the right to assign cross-errors, and the court should proceed in the disposition of the case in the same manner as when cross-errors were assigned by

consent. (Laws of 1869, p. 163.) Afterward, in *Page v. People*, 99 Ill. 418, where the question arose on demurrer to a plea in bar of the writ of error, it was held that it was optional with an appellee or defendant in error to assign cross-errors or prosecute an appeal or writ of error separate and independent of that of his adversary; that if a party assigned cross-errors he could not afterward prosecute a writ of error upon the same record, but if he did not assign cross-errors he was not barred from prosecuting a writ of error. In general, the cases holding that a party can only protect his right by assigning cross-errors have been where the decree or judgment did not give the party all the relief that he claimed or gave to his adversary more than he was considered entitled to, and where the appellee or defendant in error might have taken an appeal or prosecuted a writ of error. Examples will be found in *Johnston v. Maples*, 49 Ill. 101, where the appellees claimed a larger amount than was awarded them by the decree. *Pool v. Docker*, 92 Ill. 501, where the appellees, without assigning cross-errors, asked the court to review a finding that there was nothing due on account of rents when an allowance ought to have been made on that account. *Gage v. Davis*, 129 Ill. 236, where the appellee insisted that the amount required to be paid as a condition to vacating the deeds was too large. *Haigh v. Carroll*, 209 Ill. 576, where the appellee sought to question allowances to the receiver. *Rodman v. Quick*, 211 Ill. 546, in which case the appellees argued that the court ought not to have given the right of redemption; and *Penn Plate Glass Co. v. Rice Co.* 216 Ill. 567, and *Street v. Thompson*, 229 id. 613, where the appellees attempted to question the refusal of the trial court to allow interest. Other cases of the same kind are *Hurd v. Ascherman*, 117 Ill. 501, *Hollingsworth v. Koon*, id. 511, and *Vose v. Strong*, 144 id. 108. If a party has not obtained all that he deems himself entitled to he may appeal, but not where he gets all that he claims. (*Gray v. Jones*, 178 Ill.

169; 2 Ency. of Pl. & Pr. 157.) The statutory assignment of cross-errors, like the assignment of errors, is the pleading of the party and sets forth the grounds upon which the appellee or defendant in error seeks a reversal of the judgment or decree. The natural conclusion would be that such an assignment is only required where a party seeks a reversal of a decree or judgment and might have appealed or sued out a writ of error.

There is a class of cases where, as a matter of practice, assignments of cross-errors are necessary to have prejudicial errors against an appellee or defendant in error corrected upon a second trial in case the judgment should be reversed. If one party appeals the opposite party will be considered as acquiescing in all rulings of the trial court unless his objections thereto are presented in some proper manner, and if the judgment should be reversed a failure to assign cross-errors on alleged erroneous rulings might preclude the party from objecting to the same rulings on another trial. Such an assignment is only considered when the court has determined to reverse the judgment or decree, and then only to the end that there may be correct rulings on another trial. The practice in such cases has no relation to the controversy here. The appellees had a right to sustain the decree upon any facts in the record, whether the facts were the same as those found by the circuit court or not, and may sustain the judgment of the Appellate Court in like manner whether the reasons given in the opinion are good or not.

On the question whether the purchases and sales of stocks made by appellees on specific orders of Mrs. Thompson and the purchases and sales reported to and ratified by her were gambling transactions, the burden of proof was on the appellants. (*Clews v. Jamieson*, 192 U. S. 461.) The facts have been stated, from which it appears that the appellees received nothing from her except their commissions and interest on money advanced, and it is therefore

contended, on their behalf, that there could be no recovery in any event because they did not win anything from Mrs. Thompson and she did not lose anything to them. On the other hand, it is contended that the bill was filed under section 132 of the Criminal Code and that the rights of appellants are secured by that section. The whole subject of gaming is under legislative control in the exercise of the police power, which gives control over those things which may be injurious to the public welfare, and the legislature may enact statutes regulating or prohibiting gambling. (*Berry v. People*, 36 Ill. 423; *Booth v. People*, 186 id. 43.) In the exercise of that power the legislature by one section of the Criminal Code have set the seal of disapproval on bucket-shops as a form of gambling injurious to the public welfare, and by another section have prohibited options to sell or buy grain or other commodity or stocks, and by section 132 have provided for the recovery of moneys lost by any wager or bet upon any unknown or contingent event. Section 132 has been interpreted in several cases as giving a right of action against a broker for losses of his customer where the understanding between them is that there is to be a settlement, as between them, on differences, merely, which amounts to gambling, and the broker in such a case is to be considered a winner. (*Pearce v. Foote*, 113 Ill. 228; *Jamieson v. Wallace*, 167 id. 388; *Kruse v. Kennett*, 181 id. 199.) It seemed necessary to construe the statute in that way to reach the evil intended to be suppressed, and it must be regarded as settled law that if purchases of stocks are made by a broker with the understanding between him and his customer that there is to be no obligation on the part of the customer to take and pay for the stocks and that the customer is not to have the right to demand and receive the stocks, the broker is to be regarded as a winner of any money deposited with him and lost by the customer in the transaction. To make a transaction in stocks a gambling transaction it must appear that

neither party intended the stocks to be delivered or intended an actual purchase and sale but that both had the intention of settling on the differences, only.

Considering the question of fact, the transactions had the form of legitimate purchases and sales, and there was no evidence whatever of any understanding between the appellees and Mrs. Thompson that she was not to take or pay for the stocks purchased or deliver stocks sold, nor that there should be a settlement between them upon the differences in market values. Members of the firm called as witnesses by the appellants testified that there was no such understanding or agreement, and the only ground for claiming that there was an intent to gamble and settle by differences is that the transactions were of great magnitude in proportion to the wealth of Mrs. Thompson. The fact that the purchases during the period ran into millions of dollars is pressed upon our attention by counsel for appellants, and the fact that a purchaser is unable to take and pay for property is often of considerable importance in determining the nature of the transaction. The statement, however, is quite misleading without the explanation that while the purchases were for large amounts of stocks there were frequent corresponding sales, and it does not appear that there ever was a balance against Mrs. Thompson, above the market value of the stocks, which she could not pay. While the appellees bought a great many stocks they sold a great many, and at the death of Mrs. Thompson she could have paid for all the stocks, and her liability to appellees, above their value, was not large compared with her estate. The transactions were not contracts for purchases and sales where the subject matter was to be delivered in the future, which is a quite common form of gambling in grain and other commodities, and the inferences as to the intention to receive or deliver which attend such transactions are absent. Circumstances which would lead to the conclusion that the intention of parties was to settle on differences in market

value at the time for delivery would not justify a belief that there was such an intention where stocks were actually sold, delivered and paid for. We can discover no reason for dividing the series of transactions into three different periods and declaring those after September 30, 1898, to be different from the previous ones. The only difference was that certain of the appellees were authorized, as agents for Mrs. Thompson, to use their own discretion in buying and selling without a specific order, but when each purchase or sale was made it was reported to her the same day and in every instance ratified. There could have been no difference in the understanding between the parties, based on the facts. There were times when appellees held stocks of greater value than Mrs. Thompson would have been able to take and pay for with her other estate, but the stocks were good security for something near the purchase price of them, and if they were taken into account there was no time when she could not have paid the balance. We are of the opinion that the whole series of transactions were legitimate and were not gambling transactions.

At the death of Mrs. Thompson the appellees had on hand stocks purchased by her which could have been sold for \$173,000, and the appellants took control of the same and directed the disposal of them. The appellees had paid Mrs. Thompson over \$50,000 as profits of the transactions conducted by them, and if appellants had then disaffirmed the transactions as of a gambling nature they would have had no claim or demand against the appellees. If the transactions had been gambling transactions the appellants might have disaffirmed them, but if they had done so they would not have been entitled to recover anything, for the reason that the account then stood with a profit. There was a difference between the market value of the stocks on hand and the amount of the indebtedness, but more than that had been paid to Mrs. Thompson as profits. The appellants did not allege in their bill, and do not claim, that they were

gambling, and the losses on the whole series of transactions occurred during the period of seventeen months during which they demanded and received deliveries of stocks. The transactions, if criminal in nature, could not be ratified. (2 Pomeroy's Eq. Jur. sec. 964.) But that is not the question here. As the appellants were not gambling and the losses resulted from the depreciation of the stocks while under their control, they could not recover such losses under section 132 of the Criminal Code.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE HAND, dissenting.

FRANCIS M. PRICE, Appellant, *vs.* BLANCHE SPRINGER
et al.—(ALLEN W. MANN, Appellee.)

Opinion filed June 16, 1909—Rehearing denied October 7, 1909.

1. JUDGMENTS AND DECREES—*no universal rule can be laid down as to when order is final or interlocutory.* It is impracticable to lay down a rule which will be applicable to every case, separating into classes orders which are final and appealable and those which are interlocutory.

2. SAME—*when order granting leave to intervene in partition is interlocutory.* An order setting aside a partition decree and granting leave to an intervening petitioner to become a defendant to the partition proceeding and answer the bill will be regarded as interlocutory, even though the order finds that the court has "heard all of the evidence" and that the intervening petitioner "is the owner of an equitable one-fourth interest" in the premises, where such order was treated by all the parties as interlocutory until the intervenor filed an amended answer setting up that it was final.

3. PRACTICE—*evidence as to claim of the intervening petitioner should be heard on final hearing.* Where the prayer of a petition to intervene in a partition suit is granted and leave is given to the intervening petitioner to answer the bill, the evidence on the issue made by his answer should be heard on final hearing of the cause.

VICKERS, J., dissenting.

APPEAL from the Circuit Court of Crawford county; the Hon. E. E. NEWLIN, Judge, presiding.

VALMORE PARKER, and CALLAHAN, JONES & LOWE, for appellant.

MAXWELL & MAXWELL, S. W. KINCAID, and J. C. EAGLETON, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Robert M. Boyd died intestate in 1895. At the time of his death he and his wife, Nancy A. Boyd, were tenants in common of the north-east quarter of the south-east quarter of section 6, township 5, north, range 12, west, in Crawford county. On August 12, 1904, Nancy A. Boyd, by warranty deed, conveyed her undivided one-half interest in the above described land to Francis M. Price for the consideration of \$500. Price, with others interested, filed a bill for partition, making the widow and such heirs of Robert M. Boyd as were not complainants, defendants. At the March term, 1906, of the Crawford county circuit court, a decree was entered finding Price to be the owner of one-half and the heirs of Robert M. Boyd to be the owners of the other half of said land, the latter interests subject to the dower of Nancy A. Boyd. Commissioners were appointed to make partition, and submitted their report at the following September term. Some of the Boyd heirs filed exceptions to the report of the commissioners. These exceptions were overruled and are not involved in this appeal.

December 16, 1906, Allen W. Mann filed an intervening petition, claiming to be the equitable owner of an undivided half of that portion of the premises set off to Price, and praying to be made a party defendant and for leave to answer. Afterwards, at the same term, on January 7, 1907, by leave of court, Mann filed an amended intervening

petition, in which he set out more in detail the nature of his claim. By this amended petition Mann alleged that he furnished the entire purchase money paid to Mrs. Boyd for the land, and that there was an agreement between petitioner and Price that Price re-pay petitioner one-half of such purchase money, and that Price would take the title in his name and hold it for the benefit of petitioner and Price, and the prayer of the petition was that upon the final hearing petitioner's interest in said real estate, being the undivided one-fourth interest, be set off and allotted to him, "to the end that his interest in said real estate may be adjudged and determined by this honorable court," and that petitioner be made a party defendant and allowed to answer the complainant's bill of complaint, and for further relief. Price answered the amended petition, denying specifically all of its material averments. By his answer he averred that he and Mann were engaged in buying and shipping live stock for their joint benefit; that in paying Mrs. Boyd for the land he used partnership money, but that afterwards an accounting was had, and he gave to Mann a note, pleading a tender of the full amount due Mann thereon. He denied any agreement or understanding that Mann was to be in any way interested in the purchase of Mrs. Boyd's interest and denied the right of Mann to intervene and be made a party.

After a replication was filed and Price had amended his answer and the issues were joined between Price and Mann a hearing was had, and on February 27, 1907, a decree was entered setting forth, among other things, that "the court having heard all of the evidence and argument of counsel and being fully satisfied in the premises, finds that the said Allen W. Mann is the owner of an equitable, undivided one-fourth interest in the north-east quarter of the south-east quarter of section 6, of township 5, north of range 12, west, situated in the county of Crawford, State of Illinois, the same being the land sought to be partitioned

in this case, and that said Allen W. Mann is a necessary party to this suit. It is therefore adjudged and decreed that the prayer of this intervening petition be granted. It is further ordered and decreed that the report of the commissioners, and the order appointing the commissioners, and the decree heretofore rendered in this cause, are set aside and vacated. It is further ordered and decreed that said Allen W. Mann be and is hereby made a party defendant to the original bill in this cause, and that said Allen W. Mann be and is hereby given leave to answer said original bills of complaint."

In pursuance of the decree above recited, Mann filed an answer to the original and amended bills March 4, 1907, in which, among other things, he alleged that he was the equitable owner of an undivided one-fourth interest, as set forth in the intervening petition. In this answer he did not allege that the decree of February 27 was final or claim that it in any way settled the rights of Price and himself. Price excepted to this answer. June 27, 1907, Mann filed an amended answer, in which for the first time he set up the fact that said decree of February 27 was a final decree and settled his and Price's interests. On the same day he filed a cross-bill setting up substantially the same facts as in his amended answer of that date. November 15, 1907, counsel for Price filed a petition to modify said decree of February 27, 1907, by striking out that part of the decree which found that said Allen W. Mann was the owner of an equitable one-fourth interest in said property, and alleged that that part of the decree was inadvertently written in by the trial judge on his docket. After a hearing on this motion it was overruled by the court on April 10, 1908. Several other pleadings were filed, which are unnecessary to be considered on the issues here before us.

After the issues were finally joined a hearing was had, and December 10, 1908, a final decree was entered, from which this appeal was prayed and allowed to this court.

By this decree it was found that the interests of the parties were the same as found in the original decree, except as to one interest which had been conveyed in the meantime, and the interest of F. M. Price, which was held to be only one-fourth instead of one-half, as found in the original decree. Upon this hearing the court held that the question whether Mann was entitled to an undivided one-fourth interest had been determined by the hearing of the intervening petition and the decree of February 27, 1907, and that Price was concluded from re-litigating that question on the final hearing, and refused to permit Price to introduce evidence disputing Mann's interest, on the ground that that question had already been adjudicated.

It is manifest from this record that the decree, when entered, was not thought to be final by the parties to this litigation. Even considering the decree alone, the conclusion should fairly be reached that it was interlocutory and not final. This conclusion, we think, is inevitable when the decree is considered in connection with the other pleadings in the case. Neither the original nor the amended intervening petition would indicate that the appellee, Mann, expected to have a final hearing as to his interests until after he was permitted to answer. His first answer, filed March 4, 1907, after said decree of February 27, 1907, was entered, cannot be consistently construed in any other manner. Without question, at that time neither Mann nor his counsel understood that the said decree of February 27 was final. While said decree states that the court heard evidence, there is nothing in the record before us to indicate whether this was anything more than a formal finding by the decree. Whether this question was fully gone into does not appear. It is quite apparent from the pleadings and record in this cause that up to the time of filing the amended answer and cross-bill by Mann, on June 24, 1907, all parties were proceeding with the litigation as if the final hearing on the question as to whether Mann was the owner of

a one-fourth equitable interest in said property was still to be heard and decided. It is impractical to lay down any rule which will be applicable to every case, so as to separate into classes those orders which are final and appealable and those which are only interlocutory. The courts are often called upon to exercise judgment in a given case and decide whether or not an order is final or interlocutory from the peculiar circumstances of that case. (*Camden and Amboy Railroad Co. v. Stewart*, 21 N. J. Eq. 484; 2 Beach on Modern Equity Practice, sec. 938.) We have no doubt on this record that the order of February 27, 1907, was interlocutory, even though that part of its finding be given full force which stated that Allen W. Mann is "the owner of the equitable undivided one-fourth interest" in the said property. It was the duty of the trial court to hear the evidence on this issue on the final hearing of this cause. While that part of said decree of February 27, 1907, might, by itself alone, be considered final, we think the entire decree and the records in this case are of such a nature that that part of said decree can be modified, if necessary, under the rule that prevails in this State that until a final decree all previously rendered decretal orders are before the court for review and may be altered, modified or vacated, as the circumstances may require. *Hawkins v. Taber*, 47 Ill. 459; *Jeffery v. Robbins*, 167 id. 375; *Gibson v. Rees*, 50 id. 383.

As this case must be heard in the trial court on the merits, it would be improper for us to express our views on the questions discussed in the briefs as to the trust relations between Mann and Price in the property here in question.

For the error in not permitting appellant to introduce the evidence in question, the final decree of December 10, 1908, in this cause must be reversed and the cause remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

Mr. JUSTICE VICKERS, dissenting:

I do not concur in the views expressed in the majority opinion. In the view that I take of this case Price should be held bound by the determination of the issue made up and tried between him and Mann on the petition to permit Mann to intervene. The situation presented by this record is peculiar, and calls for the application, as I think, of a different rule from that laid down in the majority opinion.

The intervention of Mann in this case was after the court had rendered a decree settling the rights of all the other parties. If he had no interest there was no reason for vacating the final decree or otherwise interrupting the progress of the cause. If the application to intervene had been made before the final decree, the trial court would have, no doubt, permitted him to become a party upon his showing, *prima facie*, an interest in the event of the suit. But at the time the petition was presented there was no question undetermined in the case as to the interest of the parties except the question raised by the petition. Under section 14 of chapter 106 of our statute Mann had the right to come in at any time during the pendency of the suit and answer the petition and have his rights determined, the same as though he had been made a party in the first instance. *Kester v. Stark*, 19 Ill. 328.

When the petition for intervention was filed the parties made up an issue and without objection proceeded to trial of that issue before the court, both parties introducing evidence. The record shows that after the evidence was all heard and the court had heard the arguments of counsel the issue thus submitted was decided by the court, which will appear from the decree of the court entered at that time. Appellant, Price, insists that the decree of the court entered on the hearing of the intervening petition was interlocutory, and that it was error in the court to refuse to hear further evidence in relation to the trust claimed by

Mann, on the final hearing. I have no doubt that this order was interlocutory,—at least to the extent that the court might, for good cause shown on the final hearing, have modified or vacated it in furtherance of justice. The general rule prevails in this State that until a final decree all previously rendered decretal orders are before the court for review, and may be altered, modified or vacated, as the circumstances of the case may require. *Hawkins v. Taber*, 47 Ill. 459; *Gibson v. Rees*, 50 id. 383; *Jeffery v. Robins*, 167 id. 375.

While conceding to the fullest extent the power of the court, on final hearing, over all previous orders entered, it by no means follows that a court of equity will exercise this power simply because some dissatisfied party may request a reconsideration of the question settled by the interlocutory order. In the absence of any showing by the party against whom such interlocutory order is entered that there are unconsidered facts which would tend to impeach the correctness of the decree or show that the judgment of the court ought to be modified or vacated, the court is not required to re-hear such interlocutory matter. In other words, the court is not required, on final hearing, to go through the unnecessary form of re-trying a question on the same evidence that has already been considered and the question decided.

Appellant made no suggestion, on the final hearing, of any newly discovered evidence, nor did he offer any other reason why he was entitled to a rehearing upon the issue between himself and appellee. Under these circumstances I think the court properly refused to re-try this issue.

JOHN P. FOSS, Appellant, vs. THE PEOPLE'S GAS LIGHT
AND COKE COMPANY, Appellee.

Opinion filed June 16, 1909—Rehearing denied October 14, 1909.

1. **PLEADING**—*what is sufficient averment of complainant's relation as stockholder.* In a bill by a stockholder against a corporation for accounting and relief, an averment that "in or about 1857 the complainant became, ever since has been and now is a stockholder" of defendant corporation "and the owner of 1500 shares, of the par value of \$50 each, of the original capital stock of said defendant corporation," is a sufficient statement of complainant's relationship as a stockholder to require the defendant to answer.

2. **SAME**—*averments of cross-bill not considered in determining sufficiency of original bill.* In determining the sufficiency of an original bill, facts stated only in a cross-bill filed by a party made a defendant on his intervening petition cannot be considered, since to so bring extraneous facts into view would be, in effect, to recognize a speaking demurrer, which is never allowable.

3. **SAME**—*what averments in bill show laches.* An averment in a bill to the effect that the complainant, "before the commencement of this suit," made demands upon the defendant corporation for an accounting and for an opportunity, as a stockholder, to examine its books, shows *laches* on its face, where the bill also shows that the complainant has been a stockholder of the corporation for nearly fifty years, during which time his rights have been denied.

4. **LACHES**—*when delay in making demand will bar relief.* If a demand upon a corporation by a stockholder is a necessary condition precedent to his right to bring suit, unreasonable delay in making demand is as much a bar as delay in beginning suit, and, if unexplained, his right to relief will be as effectually barred in the one case as in the other.

5. **SAME**—*stockholder must use due diligence in seeking relief against corporation.* A stockholder must act with due diligence in seeking relief against a corporation for acts and omissions of such a character as would naturally be within his knowledge, and his unreasonable and unexplained delay will bar his rights, notwithstanding the trust relation existing between a corporation and its stockholders.

6. **AMENDMENTS**—*matter of amendments in chancery is largely within chancellor's discretion.* The matter of allowing amendments in chancery proceedings is largely within the discretion of the trial court, and the Supreme Court will not reverse for refusal of leave to amend unless there has been an abuse of such discretion.

7. APPEALS AND ERRORS—*when it is not error to dismiss bill.* If a bill, as amended after demurrer, is so defective as to show that the complainant has no cause for equitable relief, it is not error to sustain a demurrer to such amended bill, deny leave to make further amendments and dismiss the bill.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. J. W. MACK, Judge, presiding.

KNIGHT, BARBOUR & ADAMS, FRANCIS W. WALKER, ROBERT F. PETTIBONE, and FRED H. RAYMOND, (H. S. & F. S. OSBORNE, and ALBERT G. WELCH, of counsel,) for appellant.

SEARS, MEAGHER & WHITNEY, (JAMES F. MEAGHER, and JESSE J. RICKS, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court :

John P. Foss filed a bill in the circuit court of Cook county against the People's Gas Light and Coke Company, to which a general demurrer was interposed and sustained. Afterwards Foss filed an amended bill, to which a general demurrer was sustained, the complainant's application to further amend his bill denied and the bill dismissed. The decree dismissing the bill for want of equity having been affirmed by the Appellate Court for the First District, by his further appeal Foss has brought the record to this court for review.

Only two questions are presented for our consideration: First, did the court err in sustaining the demurrer to the amended bill? Second, if the bill was defective, did the court err in denying the appellant's application for leave to amend?

The amended bill states that the defendant gas company is an Illinois corporation, organized under a special act of the legislature approved February 12, 1855, and amended

in 1865; that said gas company is engaged in the manufacture and sale of gas for illuminating and other purposes in the city of Chicago; that said company has since 1865, been extensively engaged in the manufacture and sale of gas, from which large revenues and profits have been derived which by right ought to have been distributed to the stockholders; that about the year 1887 the gas company, by merger or consolidation, acquired the property and franchises of the Illinois Light, Heat and Power Company, and that subsequently, between 1887 and 1899, a number of other gas companies were merged into or consolidated with the appellee company; that appellee, as such consolidated company, has been engaged in the manufacture and sale of gas in the city of Chicago, and elsewhere in Cook county, all the time since the mergers or consolidations occurred, and that from such business the company has derived large profits and incomes, the surplus of which, after the payment of its debts and obligations, is, and by right ought to be, the property of its stockholders; that the original capital stock of appellee was \$500,000, and that since the company was organized under the authority of the amendatory act of February, 1865, the capital stock has been increased from time to time, as the exigencies of its business and the purchase of other properties required, until now the capital stock of appellee is \$35,000,000, of which shares to the amount of \$32,969,100 have been issued and are now outstanding. The amended bill then avers "that in or about 1857 complainant became, ever since has been and now is a stockholder of the People's Gas Light and Coke Company and the owner of 1500 shares, of the par value of \$50 each, of the original capital stock of said defendant corporation, which were and are full paid and non-assessable, and that complainant, since the year 1857, has been, and now is, entitled to receive his proportionate share of the surplus profits earned by the defendant corporation whenever any distribution of the surplus profits of defendant has

been made to the stockholders of said corporation." The amended bill then proceeds as follows:

"That at various times since 1857, which times complainant is unable to state definitely, said corporation has declared dividends of stock and money and has made distributions of profits among its other stockholders to the exclusion of complainant; that complainant has participated in none of such distributions of stock, money or other property; that complainant has inquired of said corporation, and of its officers and managers, the time and amount, character and extent of such distributions of stock, money and property, but although complainant has so as aforesaid demanded to know the times, extent and character of said distributions, yet defendant, its officers and managers, have hitherto failed and refused to inform complainant thereof, and still do so refuse, to the manifest injury of complainant and in fraud of his rights as a stockholder of said corporation. Complainant is informed and believes, and so states, that defendant has acquired stocks, bonds and other securities of the aforesaid corporations, by consolidation or otherwise, which were and are of great value, and which complainant is informed and believes have, either in whole or in part, been distributed to various favored stockholders of defendant but complainant has been excluded from such distribution; that complainant, before the commencement of this suit, demanded from defendant a statement of such acquisitions and distributions, but defendant failed and refused to make any statement thereof to complainant; that the complainant also demanded, before the commencement of this suit, his proportion of such stocks, bonds and other securities and property, but defendant failed and refused, and still fails and refuses, to distribute to complainant his proportionate share of the same; that before the commencement of this suit complainant demanded of defendant that it account with him for the profits of its said business and concerning the management thereof, and that it inform the

complainant of the terms and conditions upon which defendant acquired the properties, privileges, franchises and effects of the aforesaid companies, and of the terms and conditions upon which it holds the same, and the amount, character and value thereof; and also, before the commencement of this suit, demanded of the defendant opportunity to examine the books, records and papers of the defendant, and demanded a statement of the conditions of the business of defendant and of the conditions upon which the defendant acquired the aforesaid securities, properties, franchises, privileges and effects of the aforesaid companies, and demanded the proportion of the capital stock of said company distributable to complainant by reason of his original holdings, and demanded an account by defendant of and concerning its business and affairs since complainant became a stockholder therein, and of the amount of its profits distributed to its stockholders, as aforesaid, and of the amount and disposition of the profits distributable to complainant on account of his said holding and ownership, as aforesaid, and the privilege of inspecting the books, records and papers of defendant to which complainant is entitled as a stockholder, as aforesaid, but the complainant further shows that defendant failed and refused, and still does fail, neglect and refuse, to account to complainant for the profits of its said business or concerning the management thereof, and to inform complainant of the terms and conditions upon which the said defendant has acquired the property and franchises of the aforesaid companies, or the terms or conditions upon which defendant holds the same, or the amount, character or value thereof, and has heretofore failed, neglected and refused, and still does, to permit complainant to ascertain from the books, records and papers of defendant the past or present condition of its business or the conditions upon which defendant acquired the aforesaid securities, properties and franchises of the aforesaid companies, and failed and refused, and still does fail and re-

fuse, to distribute to the complainant his proportion of the capital stock of said company distributable to him by reason of his original holdings, and the increase thereof, and failed and refused, and still does fail and refuse, to render complainant an account concerning its business and affairs and the amount of its profits distributable to its stockholders, as aforesaid, and of the amount and disposition of the profits distributable to complainant upon account of his said holdings, as aforesaid, and defendant failed, neglected and refused, and still does fail, neglect and refuse, to allow the complainant the privilege of inspecting the books, records and papers of defendant; that the officers and agents of defendant are fraudulently diverting the revenue, gains and profits of said corporation from the proper channels and from its stockholders proportionately, and are applying said revenue, gains and profits to the benefit of certain of the stockholders of said company, and thereby defrauding complainant and others of said stockholders of his and their rights in the premises, and that defendant is conspiring with various persons to complainant unknown, but who, when discovered, he prays may be made parties to this bill, to deprive complainant of his proportionate share of the revenues, gains and profits of defendant and of his rights as a stockholder, and so conspiring is distributing to such other unknown persons certain of the moneys and profits and things valuable which of right belong to complainant, and thereby defrauding complainant, to his irreparable loss and injury, and complainant fears and charges that he is in danger of losing the amount due him as his proportionate share of said revenue, gains and profits of said corporation unless some suitable person is appointed by this honorable court, as receiver, to receive and take charge of the books of account of said corporation and collect the amounts due the same, and receive and take charge of said corporation's assets and collect and receive the revenue, gains and profits

due or to become due to defendant as one of the stockholders and owners of stock therein."

The prayer of the amended bill was for an answer, and that defendant may be required to "account to complainant of and concerning the business and affairs of said company since complainant has been a stockholder therein, as aforesaid, the amount and character of its capital, the amount of said capital to which complainant has become entitled, from time to time, by reason of the increase of said capital, and what, if any, disposition has been made thereof, and concerning the profits made by defendant in its business since complainant has been a stockholder therein, and concerning the amount of the profits of said consolidated corporation, and to set forth and discover the amount and nature of such profits payable to complainant on account of his said holdings, and what, if any, disposition has been made thereof, and to set forth and discover the nature and character of the transactions between the defendant and the aforesaid corporations whose property and franchises have been acquired by the defendant by lease, purchase or otherwise, or through consolidation, and the amount and character of the securities acquired by defendant as the result of such lease, purchase or consolidation, and what disposition has been made thereof, and the nature, character and proportion of said securities distributable to complainant upon account of his holdings, as aforesaid, and upon account of the stock to which complainant would be entitled by reason of his said holdings and by reason of the increase in the capital of defendant, and what, if any, disposition has been made thereof, and that defendant may be required to pay complainant such sums as may be found to be due upon such accounting, together with legal interest, and that defendant may be decreed to surrender to complainant the proportion of the capital of defendant to which complainant is entitled by reason of his ownership of said fifteen per cent of the original capital of defendant, and such securities as have

been acquired by the defendant either by purchase, lease or through the consolidation of said defendant with the aforesaid companies as complainant may be entitled to receive, and that defendant may be required to set forth and discover the nature and extent of complainant's rights, from time to time, as a stockholder in defendant, and of the business and affairs of defendant since complainant has been a stockholder therein, so far as may be necessary to a complete adjustment of the accounts between complainant and defendant and as equity may require, and to that end that defendant may be required, under the supervision of the court, upon such terms as may seem proper, to submit its books, records and papers for the inspection of complainant or his solicitors, or so much thereof as may be necessary to a complete understanding of the business and affairs of defendant since complainant has been a stockholder, and that some proper person may in the meantime be appointed by the court, as receiver, to take charge of said corporation's books of account and collect the accounts due and receive and take charge of said corporation's assets, and collect whatever other money or property may belong or be due to said corporation, and receive and collect the revenue, gains and profits now due said corporation and to become due, and that complainant may have such other and further relief as equity may require."

The first question arising upon this record is the sufficiency of the averment as to appellant's relation to the corporation. The appellee contends that the statement in the amended bill "that in or about 1857 complainant became, ever since has been and now is a stockholder of the People's Gas Light and Coke Company and the owner of 1500 shares, of the par value of \$50 each, of the original capital stock of said defendant corporation," is the statement of a mere legal conclusion, and this contention has been sustained by the circuit and Appellate Courts. Whether this averment is sufficient to require appellee to answer the bill

has received exhaustive discussion by counsel, both in their briefs and in the oral argument. The general rule that a pleading, in equity as well as at law, should state facts and not mere conclusions of law is plain enough, but it is not always an easy matter to determine whether a particular statement in a pleading is a statement of facts which ought to be pleaded or a conclusion of law which should be avoided. So far as we know, no one has attempted to formulate a rule which will enable one in all cases to determine whether a statement belongs to one class or the other. The books abound with cases where it became necessary to determine whether a particular statement was a statement of ultimate fact or an inference of law. But these cases, while useful as mere precedents, are of little value as authorities, except where the same statement occurs under like circumstances. As we understand appellee's contention, it is that appellant should state the manner in which he became a stockholder and the owner of the shares claimed. The general statement in the bill that appellant in 1857 "became, ever since has been and now is a stockholder" of the appellee company "and the owner of 1500 shares, of the par value of \$50 each, of the original capital stock of said defendant corporation," is a charge or statement of an ultimate fact. Story, in his work on Equity Pleadings, (10th ed. sec. 28,) says: "A general charge or a statement, however, of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs." Had appellant stated in his bill that in 1857 he was asked to subscribe for stock in the defendant company, and that he thereupon signed his name to a subscription list, by which he agreed to subscribe for 1500 shares, and that afterwards he was called upon by the company and paid the full amount of \$50 per share, which was then and there accepted by

said company, and that thereupon said company, by its duly elected president and secretary, then and there issued to appellant a certificate of stock, under the corporate seal of the company, in evidence of appellant's ownership of 1500 shares of the original capital stock of said company, and that thereupon appellant's name was duly enrolled upon the books of said corporation as a stockholder, these several averments would be merely evidentiary in their character, and when taken together they would tend to prove that appellant was a stockholder and the owner of 1500 shares of stock; or if the facts above recited were stated with reference to another person, and appellant should add the averment that after the issuance of said stock to such other person said stock was duly assigned to appellant for a valuable consideration and transferred on the books of the company to appellant, this would not change the situation. The facts averred would be subsidiary in their nature and tend to prove the ultimate fact charged that the appellant is a stockholder and the owner of said shares. We cannot conceive of any averment that could be made in elaboration of the statement that appellant is a stockholder and the owner of these shares of stock that would not be open to the objection that it was an unnecessary pleading of evidentiary facts. If the legal rights of a stockholder and the owner of shares of stock were varied according to the method by which those relations were created, and appellant sought the enforcement of rights that only belong to such stockholders and owners of stock as acquired these relations in a particular method, then it would be necessary to aver, not merely the general relation, but the fact that such relation was acquired in accordance with the method which gave rise to the rights claimed. But we are aware of no special circumstances which distinguish between stockholders, giving to one rights which are denied to others. The general rule is that all stockholders stand on an equal footing, both as to benefits and burdens. There

is no ambiguity in this statement. No one could be deceived or misled as to the basis upon which appellant rests his claim. He charges that he is a stockholder in the gas company. He sets forth when he became such stockholder and the extent of his ownership in the capital stock. This is enough to enable appellee to answer this part of the bill. A simple denial of this averment will form an issue of fact which is susceptible of being tried and determined.

Samuel Doll, having been made a party defendant upon his intervening petition claiming that he had purchased one-fourth interest in the stock of appellant since the commencement of the suit, filed a cross-bill, in which some averments are made in relation to the ownership of the stock in question that are not contained in the amended bill of appellant. Doll's cross-bill was dismissed on demurrer and he has not appealed from that order. Both of the parties to this appeal, however, have discussed the demurrer to appellant's bill in the light of certain averments that are only found in Doll's cross-bill. In this respect counsel are under a misapprehension. The cross-bill is not properly before this court, and if it were, facts stated only in it could not be considered in determining the sufficiency of the amended bill. To thus bring extraneous facts into view would, in effect, be to recognize a speaking demurrer, which is never allowable.

The next objection urged to the amended bill is, that it shows upon its face that appellant has been guilty of such *laches* as to bar his recovery. There are two averments in the amended bill of demands made by appellant upon appellee,—one a demand that appellee account with appellant, and the other that appellant be given an opportunity to examine the books. The time when these demands were made is stated to have been "before the commencement of this suit." About forty-eight years elapsed between the time when appellant became a stockholder and the commencement of this suit. A demand made any time between

1857 and the filing of the bill would sustain the averments in this respect. Construing the pleading most strongly against the appellant, it must be assumed that the demands stated were made at the earliest time they could have been made after he became a stockholder. The making of a demand forty or fifty years before the bringing of the suit would amount to nothing. If a demand was a necessary condition precedent to the right to sue, it seems inevitable that appellant was guilty of gross *laches* either in making his demand or in the commencement of the suit. Want of diligence in making such demand is as much a barrier as delay in the commencement of the suit, and if unexplained, the door of equitable relief will be closed to him in the one case as well as in the other. There is no attempt in this bill to explain or excuse this unusual delay.

Appellant seeks to invoke the rule applicable to trust relations. It is contended that a corporation is a trustee for its stockholders, and that the rule which prohibits a trustee from relying on *laches* when called to an account in respect to the trust is applicable to the situation presented by this bill. There is some confusion in the authorities in regard to the true basis upon which courts of equity take jurisdiction, at the suit of a shareholder, for the purpose of administering affirmative or restrictive relief. Many—perhaps the majority—of the law writers of recognized ability have referred the jurisdiction to the general power which courts of equity exercise over the subject of trusts. Thus, in Morawetz on Corporations (vol. 1, sec. 237,) it is said: "The relation between a corporation and its several members may, for practical purposes, be treated as that of trustee and *cestui que trust*." In High on Injunctions (vol. 2, sec. 1184,) it is said that the jurisdiction of equity to control or restrain the operations of corporate bodies "may not inappropriately be considered as a branch of the general jurisdiction of courts of equity over the subject of trusts." Whatever may be the diversity of views in respect to the

basis of the jurisdiction, there is substantial unanimity among the authorities that the jurisdiction in a proper case exists to redress grievances of a shareholder which are personal to himself as such shareholder. "A shareholder must, however, use due diligence in the assertion of his rights to entitle him to relief, in equity, against a wrongful diversion of corporate funds or other misconduct on the part of the company, and negligence on his part in instituting proceedings will deprive him of the relief desired." High on Injunctions, sec. 1206.

Coquard v. National Linseed Oil Co. 171 Ill. 480, was a bill by a stockholder against the corporation in which the stockholder prayed for the complete discovery of the affairs and conditions of the corporation; that it and its officers should be enjoined from interfering with him in the exercise of his right to examine the books of the company, and from negotiating a proposed loan or declaring or paying any further dividends, and for a receiver, and other relief. The bill was dismissed on demurrer. *Laches* upon the part of the stockholder, apparent upon the face of the bill, was urged as a reason for denying relief. In reference to that question this court, on page 484, said: "He has been a stockholder since June 15, 1889, and, for aught that appears, participated in the alleged illegal acts of which he complains, in respect to the acquirement of linseed oil mills and the trust character of the business done. From that time he has had, so far as appears, full knowledge of the occurrences which he recites, at the time they took place. As a stockholder he presumably had such knowledge, and his participation or *laches* of many years would, either of them, bar him from obtaining relief on his own account. The general rule is, that a complainant must be free from participation in the illegality or wrong of which he complains, and his acquiescence and long delay will prevent him from taking personal advantage of their invalidity."

The above authority is applicable to the case at bar. The acts and omissions on the part of the corporation of which appellant complains are in the main such as would naturally be within his knowledge. If the company had refused to pay the appellant any dividends or otherwise recognize his rights as a stockholder, these facts have been known to appellant during all the years he has been a stockholder. Having knowledge that the company was pursuing a course of conduct in respect to appellant that amounted to a total denial of all his rights as a stockholder, reasonable diligence required that he should have made his appeal to a court of equity before his claim became stale. *Wilcoxon v. Wilcoxon*, 230 Ill. 93.

Appellant finally contends that the court erred in refusing him leave to amend his bill after the demurrer had been sustained the second time. The question of allowing amendments in chancery proceedings is one very much in the discretion of the trial court, and this court will not reverse for refusing leave to amend unless there has been an abuse of discretion. (*March v. Mayers*, 85 Ill. 177.) The general rule is, that if the bill is a defective statement of a good cause of action, the bill should be retained for amendment, (*Puterbaugh v. Elliott*, 22 Ill. 157,) but if the bill is so defective, in substance, as to show that the complainant has no cause for equitable relief, it is not error to dismiss the bill, especially after the court has sustained one demurrer and the complainant has had an opportunity to avoid the objections by amendments. We conclude that there was no abuse of discretion in refusing appellant leave to amend his bill.

It follows from what has been said that there was no error in sustaining the demurrer and dismissing the appellant's bill.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

ALBERT SEITH, Appellee, vs. THE COMMONWEALTH ELECTRIC COMPANY, Appellant.

Opinion filed April 23, 1909—Rehearing denied October 19, 1909.

1. TRIAL—*what tends to show negligence with respect to electric wire.* In an action against an electric company for injuries inflicted upon the plaintiff by a shock from a fallen live wire, testimony that the insulation was loose and hanging in threads, that a kite had hung on the wire for a week or two and that there were no guard wires to keep broken wires from falling, tends to show negligence by the defendant as respects the falling of the wire; and the fact that the testimony is contradicted cannot be considered by the court on a motion to direct a verdict.

2. NEGLIGENCE—*negligent act need not be sole cause to be the proximate cause.* To constitute proximate cause the negligent act or omission need not be the sole cause nor the last or nearest cause, but it is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, produces the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by a new or independent cause.

3. SAME—*injury must be natural and probable result of negligent act.* While it is not necessary, to constitute proximate cause, that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, yet it must appear that the injury was the natural and probable result of his negligence; and the question is not determined by the existence or non-existence of intervening events, but by the character thereof and the natural connection between the original act and the injurious consequences.

4. SAME—*when existence of condition is not proximate cause.* If a negligent act does nothing more than furnish a condition by which an injury is made possible, and such condition, by the subsequent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.

5. SAME—*when act of third person does not excuse wrongdoer.* If the intervening cause of an injury is set in operation by the original negligent act or omission, such original negligence is still the proximate cause, and if the circumstances are such that the injurious consequences might have been foreseen as likely to result from the original negligent act or omission, the act of the third person will not excuse the original wrongdoer.

6. SAME—*when the first negligent act is not proximate cause.* Where the act of a third person, which is the immediate cause of

an injury, is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first negligent act or omission, the connection between the first negligence and the injury is broken and the first negligence is not the proximate cause.

7. *SAME*—*test in determining the question of proximate cause.* The test in determining the question of proximate cause is whether the person guilty of the first negligent act or omission might have reasonably anticipated the intervening cause as a natural and probable result of his own negligence, and, if so, the connection between such negligence and the injury is not broken by the intervening cause.

8. *SAME*—*electric company is liable for injury resulting from effort to remove danger of live wire.* An electric company may reasonably anticipate, in case a live wire should fall upon the sidewalk or where persons using the sidewalk or roadway are likely to be injured, that someone may attempt to remove it to prevent injury, and if, as a result of such attempt, some other person is injured, the company is liable.

9. *SAME*—*when electric company is not liable for injury from live wire.* Where a live wire, which has just fallen between the sidewalk and the curb of a street, where it would do no injury to a person on the sidewalk or roadway, is struck by a policeman with his club and thrown upon a person standing on the sidewalk, the company owning the wire is not liable for the injury to such person, there being no explanation of the policeman's act and no negligence imputable to the company in not removing the wire before the injury but only in preventing the wire from falling.

VICKERS and CARTER, JJ., dissenting.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

F. M. COX, F. J. CANTY, J. C. M. CLOW, and E. E. GRAY, for appellant:

Even if plaintiff's evidence be true, it shows that no act on the part of the defendant was a proximate cause of the injury. The act of the police officer in striking the wire, as plaintiff claims he did, was, under the circumstances and

the conditions as they existed there, so uncalled for, unnecessary and without excuse that it must be considered an independent, intervening act and the sole proximate cause of plaintiff's injury. *Wolff Manf. Co. v. Wilson*, 152 Ill. 9; *Fitzgerald v. Timony*, 34 N. Y. Supp. 460; *Railway Co. v. Hedge*, 62 N. W. Rep. 887; *Wallace v. Oil Co.* 66 Fed. Rep. 260; *Cross v. Railway Co.* 36 Pac. Rep. 673; *Rockford v. Tripp*, 83 Ill. 247; *Brown v. Railway Co.* 20 Mo. App. 222; *Course v. Railway Co.* 2 N. Y. Supp. 312.

MORSE IVES, for appellee:

The fact that the defendant's wire was down, hanging loose in the public street, is *prima facie* evidence of defendant's negligence. *Haynes v. Gas Co.* 114 N. C. 203; *Linton v. Power Co.* 188 Mass. 276; *O'Leary v. Light Co.* 107 App. Div. 505; *Electric Co. v. Simpson*, 21 Colo. 371.

The negligence of the defendant concurred with the act of the policeman. The injury to the plaintiff followed naturally from the negligent act of the defendant, and the defendant might readily have anticipated that some injury might result to somebody, in some manner, by reason of a heavily charged electric wire falling and remaining in a public street. *Carterville v. Cook*, 129 Ill. 152; *Car Co. v. Laack*, 143 id. 242; *McGregor v. Reid, Murdoch & Co.* 178 id. 464; *Armour & Co. v. Golkowska*, 202 id. 144; *Railroad Co. v. Harrington*, 192 id. 10; *Electric Co. v. Rose*, 214 id. 545; *Traction Co. v. Wilson*, 217 id. 47; *Siegel, Cooper & Co. v. Trcka*, 218 id. 559; *Railroad Co. v. Siler*, 229 id. 390; *Flanagan v. Wells Bros. Co.* 237 id. 82; *Kansas City v. Gilbert*, 65 Kan. 469.

The following cases not only support the principle we contend for, but are very similar in their facts to the case at bar: *Kansas City v. Gilbert*, 65 Kan. 469; *Lundeen v. Light Co.* 17 Mont. 32; *Twist v. Rochester*, 37 App. Div. 307; *Smith v. Telephone Co.* 113 Mo. App. 429; *Telephone Co. v. Thomas*, 99 S. W. Rep. 879.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Albert Seith, brought this action on the case in the circuit court of Cook county against the appellant, Commonwealth Electric Company. The declaration in various counts charged the defendant with a failure to use ordinary care to guard, protect and maintain a wire used for the transmission of electricity over a public sidewalk in the city of Chicago, and using wire that was frail and weak, and allowing the insulation to become worn, and negligently allowing the wire to come in contact with another electric wire, causing it to break and one end to fall upon the sidewalk. It was alleged that the plaintiff, while walking on the sidewalk and exercising due care and caution, came in contact with the wire and was thereby injured. The defendant filed a plea of the general issue, and upon a trial there was a verdict and judgment for \$4000 damages, and the judgment has been affirmed by the Appellate Court for the First District.

The question raised by the brief and argument of counsel is whether the trial court erred in refusing to direct a verdict for the defendant.

The evidence was to the following effect: The city of Chicago granted a license to the defendant to suspend its wires over certain streets, and one condition was that the wires should be properly insulated, and all overhead conductors should be protected by guard wires or other suitable mechanical device or devices. A line of the electric wires ran south on the west side of Noble street from a pole at the south-west corner of its intersection with Grant avenue, a street running east and west. The next pole south on Noble street was about one hundred feet distant. There were four cross-arms on the poles and the wires of the defendant were on the top cross-arm. They had been up about eight or nine months, and the insulation was the same

kind ordinarily used and was good when the wires were strung. On August 19, 1903, two of the defendant's wires were burned off between these two poles, and the wire which caused the injury to plaintiff fell on the ground between the sidewalk and the roadway, near the middle of a space about five or six feet wide, about twenty feet north of the second pole and near the south end of a building at the corner in question. A policeman was getting off a Noble street car at the street intersection and saw the wire drop, and two little girls, who were thirteen years old at the time of the trial, in 1907, were coming out of an alley south of said corner building and saw the wire which had just fallen, while it was still in motion. Afterward it laid still on the ground. The first floor of the building on the corner was occupied by a saloon, and the plaintiff lived in a flat in the third story of that building. The two children went to the front door of the saloon on Grant avenue and told the saloon-keeper that a live wire was broken and had fallen to the ground. The children had come around to the side door near the rear, on Noble street, and two policemen who were in the saloon when they gave notice came out and one of the policemen went where the wire was lying. The policeman who had just got off the street car went into the saloon and ordered a glass of beer. About the time that the policeman went where the wire was, the plaintiff came down from his flat by the back stairs at the rear of the building, carrying a pail. The disputed question of fact was whether the plaintiff then picked up the wire or whether it was thrown on him by one of the policemen. The two children testified that as the plaintiff was walking south on the sidewalk, the policeman who stood by the wire struck it with his club and knocked it toward the sidewalk, and that the plaintiff caught it with his hand and brought it against his breast and fell down, with his head to the west and his feet to the east, on the space between the walk and the roadway. The plaintiff said that he did not notice any wire, but saw the

policeman strike at something and noticed something fly up and hit him, but did not know it was a wire until after the accident. Another witness said that he saw plaintiff come down the stairs with a pail in his hand and suddenly saw him throw up his hands, and the next instant he went to the ground. On the part of the defendant, the three policemen, a horse-shoer whose shop was south of the rear stairway, and the bar-tender, testified that the plaintiff picked up the wire himself and the policeman did not strike it. The first policeman, who ordered the glass of beer, testified that he was standing in front of a mirror in the saloon, in which he saw a man come along and pick up the end of the wire; that the witness made an exclamation and ran out of the side door across the street, where he pulled a plank off the sidewalk and ran back and tried to knock the wire out of plaintiff's hand; that he failed, and another person picked the plank up and knocked the wire out of his hand. The blacksmith testified that the plaintiff picked the wire up and pulled it through his hands until he came to the bare end, when he fell down, and that a policeman pulled a plank off the sidewalk on the other side of the street and with it knocked the wire out of plaintiff's hand. The bar-tender said that the plaintiff walked up to the wire and stooped down and took hold of it, and then straightened up and went down like a log, backwards. The policeman who was charged with striking the wire testified that plaintiff said it was not a live wire, and the witness told him to get away from it, but he walked toward it and picked it up, and that he moved his hand toward the end of the wire where it was broken, and when he reached the end he fell down. The third policeman said that the one at the wire told the plaintiff to get away from there and the plaintiff said it was a dead wire; that the officer said to leave it alone, but the plaintiff stooped down and picked it up about eighteen inches from the end and drew it through his fingers until he got to the tip end, when he fell down. A kite, made of a news-

paper dated the previous day, which had been tangled on the wires and was partly burned, was taken off, and there was evidence for the plaintiff that there had been a pink kite hanging on the wires a week or two before. There were no guard wires or other mechanical device to prevent wires from falling, and one of the girls testified that the wrappings were worn away and in threads and were loose and hanging. The evidence for the defendant was that the insulation was perfect and there were no strings or anything of the kind hanging down, and the ends of the wires showing the covering in perfect condition were cut off and made exhibits in the case. There was also evidence for the defendant that guard wires are never used except where wires cross each other, but there was no other mechanical device to protect the wires.

It is argued that this evidence required a verdict for the defendant because it did not tend to prove negligence on the part of the defendant, and because its negligence, if any, was not the proximate cause of the injury. There was no evidence tending to sustain the charge that the defendant was negligent in failing to discover and remedy the condition after the wire fell, for the reason that the accident occurred immediately. In view of the testimony of the child that the wrappings, as she called it, were loose and hanging in threads, the absence of any mechanical device to prevent wires from falling, and the evidence that there had been a pink kite on the wires for some time, it cannot be said that there was no evidence fairly tending to prove negligence. The court could not consider the evidence tending to defeat the cause of action, such as the kite made of the newspaper dated the day before, which may have caused a short circuit and fused the wire, nor the ends of the wires attached to the record to prove that the insulation was perfect. Whether the child was mistaken about the insulation, in view of the other testimony, was a question for the jury, now finally settled by the judgment of the Appellate Court.

The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff. No mention of that question is made in the opinion of the Appellate Court, but that court must have concluded that the negligence of the defendant was the proximate cause of the injury, since there could be no recovery on account of such negligence unless there was a causal connection between the negligence and the injury. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established and have been applied by different courts in numerous cases to different conditions of fact. There has been practically no difference of opinion as to what the rules are, and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause. The question is not determined by the existence or non-existence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, but when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two

are not concurrent and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes which is not a consequence of the first wrongful act or omission and which could not have been foreseen by the exercise of reasonable diligence and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and if so, the connection is not broken; but if the act of the third person which is the immediate cause of the injury is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the first act or omission, the connection is broken and the first act or omission is not the proximate cause of the injury. One phase of the rule was stated in *Chicago Hair and Bristle Co. v. Mueller*, 203 Ill. 558, as follows: "If the negligent act and the injury are known, by common experience, to be usual in consequence, and the injury such as is liable, in the ordinary course of events, to follow the act of negligence, it is a question of fact for the jury whether the negligence was the proximate cause of the injury;" and there is a general review of the subject in Thompson on Negligence, chap. 5. In *Braun v. Craven*, 175 Ill. 401, the court said: "The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable result of defendant's acts, and the consequences must be such as in the ordinary course of things would flow from the acts and

could be reasonably anticipated as a result thereof." In Pollock on Torts the author declares that the only rule tenable, on principle, where the liability is founded solely on negligence, is contained in the statement "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." (Webb's Pollock on Torts, p. 45.) Judge Cooley states the rule as follows: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was more remote." (Cooley on Torts,—3d ed.—99.) In Wharton on Negligence (sec. 134) is found the following question and answer: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." The Supreme Court of the United States, in the case of *Milwaukee and St. Paul Railroad Co. v. Kellogg*, 94 U. S. 469, said: "The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The principles on which the question of proximate cause depends are illustrated by the facts of various cases in this court. In *Village of Carterville v. Cook*, 129 Ill. 152, a much used sidewalk elevated six feet above the ground was

unprotected by railing or other guard, and by the inadvertent or negligent shoving by one boy of another boy against the plaintiff, the plaintiff was pushed from the sidewalk and injured. That was plainly a case where the village ought to have anticipated the consequences of its negligence. In *American Express Co. v. Risley*, 179 Ill. 295, the express company was held liable for the consequences of placing a chute crosswise on an express car, because it could have been foreseen, by the exercise of ordinary care, that the injury which followed might result from the act. In *Garibaldi & Cuneo v. O'Connor*, 210 Ill. 284, where the plaintiff stepped upon a banana and fell, it was held that when the intervening cause of an injury could reasonably have been anticipated, the original negligent act, if it contributed to an injury, may be regarded as the proximate cause. In *Elgin, Aurora and Southern Traction Co. v. Wilson*, 217 Ill. 47, the declaration charged defendant with negligence in failing to have a switch lever locked and in failing to have the same guarded at an amusement park. There was no lock on the switch and the switch tender left his post for the attractions of a game of ball. It was held proper to submit to the jury the question whether the defendant had discharged its duty toward a passenger, although the mischievous act of a boy in changing the switch contributed to the injury. It was a case where the intervening cause of changing an unlocked and unguarded switch might reasonably have been anticipated. In *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390, the defendant negligently set a fire, and the owner of a house, in an effort to extinguish the fire, received an injury from which she died. The defendant was bound to anticipate, when the fire started, that the decedent would try to put it out, and if in so doing, with reasonable care and caution, she was injured, the setting of the fire was the proximate cause of the injury, as a result which might be anticipated. Judge Thompson illustrates the rule by supposing a similar case. (1 Thompson on Negligence, sec.

64.) In *True & True Co. v. Woda*, 201 Ill. 315, it was regarded as a question of fact whether the negligence of the defendant in piling lumber on the sidewalk in a public street where he knew the children of the neighborhood were in the habit of playing was the proximate cause of an injury, and this was upon the ground that the defendant should have known the children would be likely to climb on the lumber at play and be injured. In *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559, where the defendants were guilty of negligence in the construction of an elevator shaft and a boy fourteen years old was thrown down by another boy, it was considered that the two acts of negligence both contributed to the result, and clearly the defendant might reasonably have anticipated what actually happened in the use of the elevator.

On the other hand, in *Hullinger v. Worrell*, 83 Ill. 220, in an action on the case against a sheriff for negligence in suffering a prisoner to escape, the sheriff was held not liable for damages resulting from an assault by the prisoner on the plaintiff, because the assault was not the natural and probable consequence of permitting the prisoner to escape from custody, and not being anticipated was not the proximate result. In *City of Rockford v. Tripp*, in the same volume, page 247, where a horse with a cutter became frightened and ran away, and in passing where a team was hitched to a post set by the city for a hitching post, frightened the team and caused the team to break the post and run away and they ran over a person in the street, it was held that a defect in the post was not the proximate cause of the injury. In *Wolff Manf. Co. v. Wilson*, 152 Ill. 9, a barber's post insecurely fastened stood near the outer edge of a sidewalk, and the driver of a team in backing his wagon knocked the post over, injuring the plaintiff. The post, although not fastened as it should have been, would not have caused an injury but for the act of the driver in backing against it, and it was held the intervening cause

was the proximate cause of the injury. In *Braun v. Craven, supra*, the court affirmed the judgment of the Appellate Court reversing the judgment of the trial court without remanding the cause, on the ground that the condition of the plaintiff could not have been reasonably anticipated as a result of the defendant's negligence.

Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated. Of that character are the cases relied upon to sustain the judgment. (*Kansas City v. Gilbert*, 65 Kan. 469; *Smith v. M. and K. Telephone Co.* 113 Mo. App. 429; *Citizens' Telephone Co. v. Thomas*, (Tex.) 99 S. W. Rep. 879.) The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. There is no evidence tending in the slightest degree to prove that the policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent

injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff. In the case of *Harton v. Forest City Telephone Co.* 59 S. E. Rep. (N. C.) 1022, the telephone company negligently maintained a pole in a dangerous condition until it fell across a highway. Three persons passing in a hack set the pole up again in the same hole and propped it with a stick six to eight feet long, procured from a wood pile nearby. The pole afterward fell and killed the plaintiff's daughter, who was in a buggy with the plaintiff in the road, and the court held that there was no liability, since the negligence of the telephone company was not the proximate cause of the injury. If it could have been argued in that case that the telephone company might reasonably have anticipated the removal of the pole from the highway and the re-setting of it, no such argument can apply to the act of the policeman. The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk. The negligence of the defendant produced a condition which made the injury possible, but the injury would not have occurred but for the independent act of the policeman. That act was an independent cause of the injury by one for whose act the defendant was not responsible and by one over whom it had no control. It follows that the defendant was not liable for such act, and the negligence alleged and which the evidence tended to prove was not the proximate cause of the injury. The court ought therefore to have given the instruction directing a verdict of not guilty.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE VICKERS, dissenting:

I am not in accord with the conclusion reached by the majority opinion. The judgment is reversed because the trial court refused to direct a verdict for appellant. The conclusion is based on the assumption that there is no evidence fairly tending to show that the injury might reasonably have been anticipated from the negligence of appellant.

The majority opinion, after stating the facts and reviewing numerous authorities, proceeds as follows: "Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated."

With the rule announced in the above quotation I have not the slightest quarrel. It is difficult to see how it is legally or logically possible to avoid a conclusion directly opposite to the one reached in the majority opinion consistent with the rule laid down in the quotation which I have made. The sentences immediately following the quotation show the manner in which the majority opinion seeks to avoid the logical conclusion which seems to me ought necessarily to follow from the premises previously laid down. Those sentences are as follows: "The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. * * * The wire was lying between the

sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk."

I am wholly unable to see how this language can be reconciled with the quotation first made from the majority opinion. In the first quotation it is said that the defendant ought to anticipate that the policeman might attempt to remove the wire and injure someone, and for an injury thus caused the defendant would be liable. In the second quotation it is said that if a policeman should strike the wire with his club while it was lying where it would do no injury to anyone on the sidewalk, it is inconceivable that the defendant could have anticipated an injury thus brought about. What is it that distinguishes the situation presented in the first quotation from that implied in the second? Certainly the fact that the policeman used his club instead of his hands or feet to remove the live wire is not sufficient to render the liability "inconceivable" in the last proposition and "clear" in the first. Does the fact mentioned in the second proposition, that the wire was lying where no injury would be done by it to a person on the sidewalk, make the liability inconceivable? While the majority opinion does not say so in so many words, yet there is an intimation that the wire was not immediately on the sidewalk, and for this reason the policeman should not have attempted to remove it. If this be conceded it does not help the situation. Suppose the policeman did use poor judgment in deciding to remove the wire or in selecting the means to accomplish that purpose,—or, to put it still stronger, suppose the policeman was guilty of negligence in attempting to remove the wire,—then the utmost that can be claimed is that the policeman's negligence operated jointly with the negligence of appellant in producing the injury, and if this view be taken, under the authorities cited in the majority opinion appellant is liable. If the policeman, of his own malice or wantonness, threw the wire

on appellee and intentionally injured him appellant would not be liable. There is, however, not a particle of evidence to sustain that theory and I do not understand the majority opinion to proceed upon that hypothesis. The negligence of appellant is conclusively settled by the judgment of the Appellate Court. There is no pretense that appellee was guilty of contributory negligence. At least, if that question was ever in the case, it is likewise settled by the judgment of affirmance by the Appellate Court. 'The only thing left, then, is the question of fact whether the injury resulted from causes which ought to have been reasonably anticipated by appellant. Under the rule first above quoted from the majority opinion there ought to be no doubt as to this question. The injury occurred by the attempt of a policeman in good faith to remove a danger from a public highway, placed there by the negligence of appellant. Applying the law to these facts, I think appellant is liable.

Mr. JUSTICE CARTER, also dissenting.

NICHOLAS G. IGLEHART *et al.* Appellants, *vs.* THE CHICAGO AND ALTON RAILWAY COMPANY *et al.* Appellees.

Opinion filed June 16, 1909—Rehearing denied October 21, 1909.

1. DEDICATION—*offered dedication may be withdrawn before acceptance.* The making of a plat is a mere offer to dedicate, which, in the absence of circumstances which will estop the owner, may be withdrawn at any time before the offered dedication is accepted.

2. SAME—*dedication, though formal, is incomplete until acceptance.* The dedication of a street, even though in formal compliance with the statute, is incomplete until acceptance, and until acceptance the fee remains in the original proprietor, and his conveyance of abutting lots before acceptance carries title to the center of the street, subject to the offer of dedication.

3. SAME—*when owner of platted ground has no reversionary interest in fee of street.* Where platted territory is open prairie and there is no municipality in existence or in process of organi-

zation which can accept the dedication, the fee of platted streets remains in the owner, regardless of the question whether the plat is a statutory one or not, and if, before public acceptance, he conveys lots upon a platted street his grantee takes the fee to the center of the street, and the grantor has no reversionary interest therein. (*Hamilton v. C., B. & Q. R. R. Co.* 124 Ill. 235, followed.)

APPEAL from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding.

ARND & ARND, for appellants:

The title to Wright street was held in abeyance and vested in the town of Cicero upon its subsequent incorporation, and the subdividers had no power to convey title to the street prior to the incorporation of the town of Cicero. Rev. Stat. 1845, chap. 25, sec. 21; *Hunter v. Middleton*, 13 Ill. 50; *Canal Trustees v. Havens*, 11 id. 554; *Gebhardt v. Reeves*, 75 id. 301; *Brooklyn v. Smith*, 104 id. 429; *Sanitary District v. Adam*, 179 id. 406.

Wright street was abandoned for street purposes and the title thereto reverted to appellants, as heirs of Nicholas P. Iglehart. *Hunter v. Middleton*, 13 Ill. 50; *Gebhardt v. Reeves*, 75 id. 301; *Zinc Co. v. LaSalle*, 117 id. 411; *Winnetka v. Prouty*, 107 id. 218; 3 Kent's Com. 448; *Peoria v. Johnston*, 56 Ill. 51; *Auburn v. Goodwin*, 128 id. 57.

WINSTON, PAYNE, STRAWN & SHAW, (SILAS H. STRAWN, RALPH M. SHAW, and WALTER H. JACOBS, of counsel,) for appellees:

Although a dedication is made by the owner of land substantially complying with the requirements of the statute, nevertheless, if before acceptance the dedicatory conveys the lots abutting upon the street, such a conveyance conveys to the grantee of the abutting property the fee to the center of the street, and in the event of a subsequent vacation there is no reversion to the original dedicatory or his heirs. *Hamilton v. Railroad Co.* 124 Ill. 235; *Owen*

v. *Brookport*, 208 id. 35; *Thompson v. Maloney*, 199 id. 276; *Venice v. Ferry Co.* 216 id. 345; *Russell v. Railway Co.* 205 id. 155.

Mr. JUSTICE VICKERS delivered the opinion of the court :

This is an action of ejectment for a strip of land occupied by the Chicago and Alton Railroad Company, the Chicago and Alton Railway Company and the Joliet and Chicago Railroad Company as a road-bed and right of way. There was a finding and judgment for the defendants, and the plaintiffs have appealed.

The evidence shows that Nicholas P. Iglehart was on the 30th day of November, 1853, the owner in fee of the west half of the south-east quarter of section 36, township 39, in Cook county, Illinois, and that said Iglehart on that day, in connection with John Evans, who owned in fee the east half of said quarter section, made and executed a plat subdividing said south-east quarter section into lots and blocks, streets and alleys, and designated such subdivision "Town of Brighton." The land in controversy in this suit is a part of one of the streets of the said town of Brighton, known as Wright street, and comprises all of that portion of said street lying between Kinkeade street on the west and Blanchard avenue on the east. Plaintiffs below (appellants here) claim title to the strip in question as heirs of their deceased father, Nicholas P. Iglehart.

Appellants' contention is, that the platting of the subdivision divested the dedicator of the fee but left in him the possibility of reverter in case the street should afterwards be vacated, and that there was afterwards such abandonment or vacation of said street, whereby the fee reverted to and re-invested in the appellants, as the devisees of the dedicator. To this contention appellees reply (1) that the original dedication was not made in accordance with the statute of 1845, and that such dedication can only be upheld as a common law dedication, from which the conclu-

sion is drawn that the fee in the street in question vested, by the conveyance of the abutting lots, in the grantees of the dedicator; (2) appellees contend that even if the dedication was made in compliance with the statute then in force, the fee in the street in question did not vest in the municipality, for the reason that there was no such municipality as the town of Brighton to accept such dedication, and that before the premises in question became a part of the territory of any municipality the original dedicator had conveyed all the lots abutting on both sides of that portion of Wright street in question by a deed which conveyed said lots to the center of Wright street.

In the view we take of this case the second contention of appellees presents a complete defense to appellants' cause of action. When the platting was made the territory embraced was open prairie. The town of Brighton never existed except in name—on paper. The making of the plat, until accepted, was a mere offer on the part of the owner to dedicate, which, in the absence of circumstances which would estop the owner, could be withdrawn at any time before acceptance. (*Little v. City of Lincoln*, 106 Ill. 353.) January 31, 1855, before any steps were taken to organize the platted territory into a town, Nicholas P. Iglehart and wife conveyed all of the lots in the subdivision which fronted on that part of Wright street involved in this suit. The deed of Nicholas P. Iglehart and wife, dated January 31, 1855, conveyed to James W. Cochran, for a consideration of \$19,600, "lots 81 to 150, inclusive, and lots 153 to 160, inclusive, being seventy-eight one-acre lots, all in the town of Brighton, in the west half of the south-east quarter of section 36, 39, 13, with other property." This deed includes all of the lots abutting on that part of Wright street that is in controversy in this suit. At the time of the making of this conveyance no municipality was attempting to exercise any governmental functions over the territory in controversy.

We think the execution of this conveyance to Cochran vested the fee in the grantee to the center of Wright street, and since this deed included all the lots on both sides of Wright street, it follows that Nicholas P. Iglehart did not, at the time of his death, have a reversionary interest in the fee of this street. It is wholly immaterial whether the plat was executed in accordance with the statute or only operated as a common law dedication. In either case the result is the same. (*Hamilton v. Chicago, Burlington and Quincy Railroad Co.* 124 Ill. 235; *Owen v. Village of Brookport*, 208 id. 35.) The *Hamilton* case above cited is directly in point and is conclusive of appellants' right to recover. The dedication of the street, even if in formal compliance with the statute, was necessarily incomplete until there was an acceptance. (*City of Venice v. Ferry Co.* 216 Ill. 345.) Until acceptance the fee remained in the original proprietor, hence a conveyance of abutting lots before acceptance carried the title to the center of the street, subject to the offer of dedication. (*Hamilton v. Chicago, Burlington and Quincy Railroad Co. supra.*) It is by no means clear that the premises in question ever became a street at any time. It is true that in 1869 the town of Cicero was incorporated under a special act of the legislature and included within its limits the south-east quarter of said section 36, but many years before this town was incorporated, appellee the Joliet and Chicago Railroad Company had laid out its right of way sixty-six feet wide in the so-called Wright street, had erected fences enclosing its right of way and was in the exclusive possession of the said strip for railroad purposes. There was no travel upon it except travel upon the trains of the railroad company. In 1889 a portion of the town of Cicero, including the premises in question, was annexed to the city of Chicago. In 1900 the city of Chicago required the Chicago and Alton Railroad Company, the successor to the Joliet and Chicago Railroad Company, to elevate its road-bed, which has been done, and the prem-

ises in question in this suit are now exclusively occupied by the Chicago and Alton Railroad Company's elevated tracks and are in its possession for railroad purposes. There is not now, nor has there ever been at any time in the past, a general use of these premises as a street by the public.

We do not deem it necessary to consider other questions argued in the briefs of counsel.

The judgment of the court below is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. WILLIAM E. PETERS, Plaintiff in Error.

Opinion filed October 26, 1909.

1. CRIMINAL LAW—*when People need not make an election.* In a prosecution for falsifying a jail calendar, which the bill of particulars charges consisted in the false entry of eighteen names of persons not committed to the jail, if there is no charge that the entries were made at different times and no proof that they were so made, the prosecution is not required to make an election, but may prove, as to each name, that it was entered in the handwriting of the accused and that the person named was not committed to jail within the period stated in the entry, even though the entries are on different pages of the calendar and under different dates.

2. SAME—*when alleged incompetent testimony as to handwriting will not reverse.* The fact that a large part of the testimony of two witnesses as to the handwriting of the defendant in a prosecution for falsifying a jail calendar may have been incompetent is not ground for reversal, where the evidence remaining, if all their testimony were stricken out, would still have required a verdict of guilty, there being one unimpeached and uncontradicted witness, the competency of whose testimony is not questioned, who testified that the false entries were in the handwriting of the defendant, who offered no evidence except to prove good character.

3. SAME—*what is not ground for disregarding testimony.* In a prosecution against a deputy sheriff for making false entries in the jail calendar, the fact that one of the witnesses, who testified that the entries charged to be false were in the defendant's handwriting, was himself a deputy sheriff and made entries in the calendar is not ground for disregarding his testimony.

4. SAME—*when defendant is not prejudiced by jury's taking alleged falsified record on retirement.* The fact that the jury, in a prosecution for making false entries in a jail record, was allowed to take the record with them on retirement without anything being done to prevent their inspection of the portions of the record not offered in evidence, and thus satisfying themselves, by comparison, that the entries were in the defendant's handwriting, is not prejudicial to the defendant, where such handwriting was established by uncontradicted evidence independent of the record.

5. SAME—*intent to falsify a public record is a criminal intent.* Instructions in a prosecution for falsifying a public record which state that even though the jury might believe, beyond a reasonable doubt, that the defendant committed the act charged, still if they had a reasonable doubt as to whether he committed the act with a criminal intent to violate a public law they should find him not guilty, are properly refused where there is no evidence on which to base them, there being nothing to indicate that if the defendant falsified the record he did not intend to do so, as the intent to falsify a public record is a criminal intent.

WRIT OF ERROR to the Circuit Court of Peoria county;
the Hon. T. N. GREEN, Judge, presiding.

JOSEPH A. WEIL, for plaintiff in error:

Each offense set forth in the bill of particulars constituted a separate transaction and complete offense. An election should therefore have been compelled as to which offense would be relied upon for a conviction. Each falsification alleged was a complete transaction in itself. Where several distinct felonies are charged against a defendant or upon trial sought to be proved, an election will be required where each such offense constitutes a separate and distinct transaction. Wharton on Crim. Pl. & Pr. (9th ed.) 202; Moore on Crim. Law, (2d ed.) 659; *Goodhue v. People*, 94 Ill. 51; *Kribs v. People*, 82 id. 426; *Jansen v. People*, 159 id. 404; *Bishop v. People*, 194 id. 369.

In criminal cases it is the court's duty, of its own motion, to give instructions limiting the effect of evidence competent only for a special purpose and likely to be misapplied by the jury, and a failure to object or except will

not cure an error in this respect. 3 Ency. of Evidence, 189; *People v. Rogers*, 71 Cal. 565; *State v. Miller*, 81 Iowa, 72; *State v. Marshall*, 2 Kan. App. 792; *Fueston v. Commonwealth*, 91 Ky. 230; *State v. Donaldson*, 45 La. Ann. 744.

Under the laws of this State handwriting cannot be proved by comparing an alleged signature with a genuine one. To render a witness competent to testify as to handwriting he must be acquainted with the handwriting of a person, so as to have in his mind an exemplar, so that from memory alone he can give an opinion as to whether the writing in question is in fact the handwriting of the person whose handwriting is in issue. *Riggs v. Powell*, 142 Ill. 456.

Even though a witness may swear that he has seen the defendant write, yet this is not sufficient unless the witness is able to distinguish the handwriting as that of the defendant according to the belief of the witness, founded on his previous knowledge of the handwriting of defendant. *Putnam v. Wadley*, 40 Ill. 456; *Fash v. Blake*, 38 id. 368.

The evidence of a witness as to whether a signature is that of a certain person, that "it looks like it," is insufficient to justify the admission of the signature for any purpose. *Fullam v. Rose*, 181 Pa. 138.

Papers which have been admitted in part, only, should not go to the jury in their entirety unless proper precautions are taken to prevent inspection by the jury of the parts not in evidence. In some jurisdictions instructions to the jury not to read such parts appear to be considered sufficient to prevent any prejudice, while in other jurisdictions such instructions are regarded insufficient for this purpose. 17 Am. & Eng. Ency. of Law, (2d ed.) 1243; 12 Ency. of Pl. & Pr. 597; *People v. Thornton*, 74 Cal. 482; *Way v. Arnold*, 18 Ga. 182; *Atkins v. State*, 16 Ark. 568; *Rich v. Hayes*, 97 Me. 293; *Parker v. State*, 43 Tex. Crim. 526; *Bates v. Preble*, 151 U. S. 149; *Rawson v.*

Curtiss, 19 Ill. 456; *Dunn v. People*, 172 id. 582; *Kalamazoo Co. v. McAllister*, 36 Mich. 327.

W. H. STEAD, Attorney General, JUNE C. SMITH, Assistant Attorney General, and ROBERT SCHOLES, State's Attorney, (A. M. OTMAN, of counsel,) for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error was convicted of falsifying a public record and prosecutes a writ of error to reverse the judgment. The errors complained of are the refusal of the court to require the prosecution to elect upon which of several charges, claimed to be included in the bill of particulars, a conviction would be asked; the admission of incompetent evidence of handwriting; allowing the record alleged to have been falsified to be taken by the jury in their retirement in its entirety, without instruction or precaution to prevent inspection of parts not offered in evidence; and the giving and refusing of instructions.

The plaintiff in error was a deputy sheriff of Peoria county and assistant jailer. The record he was indicted for falsifying was the calendar of all persons committed to jail, required by the statute to be kept. The indictment consisted of seven counts, each charging, in general terms and varying language, that the defendant had falsified this record, without further particularity. The court, upon the motion of plaintiff in error, required the State's attorney to file a bill of particulars. The bill of particulars stated that "there were wrongfully, falsely and feloniously entered upon said jail record the names of the following persons, viz.," and here followed eighteen names, each followed by one word or more indicating the cause of commitment, and by two dates, the earliest being January 26, 1905, and the latest November 29, 1905. The bill of particulars continued with the statement that none of the persons named had been confined in or committed to the jail during the period

named. The plaintiff in error, claiming that the bill of particulars charged more than one offense, moved that the State's attorney be required to elect upon which charge he would proceed to trial. This motion was overruled, and the prosecution introduced evidence tending to show that the entry of one name was in the handwriting of the plaintiff in error and that the person named had never been confined in the jail. Thereupon, when the prosecution offered to prove the same facts in regard to another name, the plaintiff in error objected, on the ground that this was a separate offense and the prosecution should be confined to one charge. This objection was overruled, as was also a motion, made at the close of the evidence for the prosecution, to require an election.

The evidence of the falsification of the record consisted only of testimony that the entries referred to in the bill of particulars were in the handwriting of the plaintiff in error and that the persons named were not confined in the jail. There was no evidence as to when, how or under what circumstances the entries were made, or whether they were made at the same time or at different times. There was no charge that they were separately made. There was no evidence that they were separately made. They were made on separate pages of the book and the dates mentioned are different, but there is no evidence that the falsification of the book was not completed by the making of all the false entries at one time. The bill of particulars did not state and the evidence did not show several offenses. There was no error in not requiring the State's attorney to elect.

It is contended that a large part of the testimony of Daniel E. Potter and George N. McClure as to the handwriting of the plaintiff in error was incompetent. If all their testimony were stricken out of the record, what remained would still have required a verdict of guilty. No question is raised as to the competency of the testimony

of Frank Ford, who testified that the entries were in the handwriting of the plaintiff in error. It is true he was a deputy sheriff and himself made entries in the book, but his testimony could not be disregarded for that reason. It was not contradicted and he was not in any way impeached. No evidence was introduced by defendant except the testimony of nine witnesses as to his good character. No other verdict than one of guilty would have been justified by the evidence.

The same answer meets the objection that the jail record was permitted to be taken by the jury. The objection is made that there was nothing to prevent the jury from comparing the handwriting of numerous other entries in other parts of the book with the ones in evidence, and from that comparison satisfying themselves that the handwriting was that of the plaintiff in error. The handwriting was established by the evidence independent of the record, so that its inspection could not be harmful to plaintiff in error.

What we have said disposes also of the objections to the instructions given to the jury. The court refused to give two instructions asked by the plaintiff in error, to the effect that though they might believe, beyond a reasonable doubt, that the defendant committed the act charged, yet if they had a reasonable doubt as to whether he committed the act with a criminal intent to violate a public law they should find him not guilty. There was no evidence on which to base these instructions. If the plaintiff in error made the false entries there was nothing to indicate he did not intend to do so. An intent to do so was a criminal intent, and there is nothing on which it could be found, from the record, that the plaintiff in error made the false entries without such criminal intent.

The judgment is affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* John J. Healy, State's Attorney, Relator, *vs.* THEODORE G. CASE, Respondent.

Opinion filed October 26, 1909.

1. **DIVORCE**—*public has an interest in a divorce suit.* While a divorce suit is a controversy between private parties, yet the interest of the public in the marriage status is also concerned, and the court will regard such interest whatever attitude the parties may take, and will not grant a divorce upon the consent or collusion of the parties.

2. **SAME**—*second bill on same facts should be dismissed.* A decree dismissing a bill for divorce for want of equity, after a hearing of the complainant's evidence, is a final decree, and if the same bill is subsequently filed and the matter presented to another judge, it is his duty to dismiss the bill upon learning of the prior adjudication, whether such adjudication is pleaded or not.

3. **ATTORNEYS AT LAW**—*an attorney filing same bill for divorce a second time may be suspended.* An attorney who files a bill for divorce and obtains a decree without disclosing to the court that the same bill has been previously dismissed for want of equity by another judge upon substantially the same evidence is guilty of a fraud upon the court and may be suspended by the Supreme Court from practicing in all courts of record of the State.

FARMER, C. J., and VICKERS, J., dissenting.

INFORMATION to disbar.

ALBERT M. KALES, and JOHN L. FOGLE, for relator.

CHARLES HUGHES (S. S. GREGORY, of counsel,) for respondent.

Per CURIAM: The State's attorney of Cook county, on the relation of the committee on grievances of the Chicago bar association, filed in this court an information to disbar, or, in the alternative, to suspend or otherwise discipline, as the court in its discretion might deem proper, Theodore G. Case, an attorney, on the ground that he procured a decree of divorce in the circuit court of Cook county by fraudu-

lent collusion with the complainant and the defendant therein, and by fraudulently concealing from the knowledge of the judge the fact that substantially the same matters involved in the divorce proceeding had previously been heard and determined adversely to his client in a prior divorce proceeding in the superior court of said county, in which, upon a hearing, a final decree had been entered dismissing the bill for want of equity. In his answer the respondent denied that he had fraudulently concealed from or failed to inform the judge of the circuit court that substantially the same matters involved in the second divorce proceeding had been previously heard and determined in the superior court. He denied collusion with the complainant and defendant, or either of them, or with the solicitors of the defendant in the divorce case, or with any other person, to procure a divorce for his client, and averred that he believed at the time of the hearing, and still believed, that his client had a good cause of action and was entitled to a divorce, and that he believed the law to be that the dismissal of the bill for want of equity by the superior court was not a bar to a second suit unless pleaded in said second suit. The answer averred that in all respondent did he acted in good faith in the belief that he was justified by the law, and that he had no fraudulent or corrupt motive in any of the steps taken by him in the litigation. The issues were referred to George Mills Rogers, master in chancery of the circuit court of Cook county, as a commissioner of this court, to take the proofs and report his conclusions of law and fact therefrom. There was no controversy before the commissioner concerning the facts, which are as follows:

On July 19, 1907, the respondent filed a bill for divorce in the superior court of Cook county for his client, Eliza Ellen Epcke, praying for a divorce on the ground of extreme and repeated cruelty, and the husband, by his solicitors, afterward filed an answer denying the charges of the bill. On November 23, 1907, the respondent appeared

for the complainant before Judge Barnes and a solicitor appeared for the defendant, and the cause was heard on the testimony of the complainant and two witnesses in her behalf. The solicitor for the defendant did not cross-examine the witnesses or introduce any testimony or take any part in the hearing. A written agreement had been entered into by the parties and was presented in court as to alimony and the custody of a child. The chancellor dismissed the bill for want of equity, and after leaving the court room there was some conversation in the corridor between the respondent and his client and Adolph R. Weseman, the solicitor for defendant. According to Weseman's testimony respondent stated to his client that they were at liberty to proceed again, the decision of Judge Barnes having only the effect of a non-suit. There was discussion between respondent and Weseman as to whether the order dismissing the bill was a final disposition of the case, and respondent claimed that it was not. Two days afterward, on November 25, 1907, respondent filed in the circuit court of Cook county, a court of concurrent and equal jurisdiction with the superior court, another bill for divorce by Mrs. Epcke against her husband, containing the same allegations and charges of cruelty as the former bill, and no other. Shortly afterward respondent met Judge Stough, a judge of a circuit outside of Cook county who was then, by request of the proper authorities, holding court in Chicago, and asked him to hear the cause. The request was not a peculiar or unreasonable one according to the general practice in hearing divorce cases in Cook county, and Judge Stough agreed to comply with it. Thereupon respondent commenced to talk to the judge about the case, and the judge said: "I do not want to hear anything about it; I will hear your case when you bring your witnesses in." Weseman testified that the respondent told him, previous to the hearing before Judge Stough, that he had started to tell Judge Stough about the former hearing but was told by the judge he did not want

to talk about the case; that if respondent made a good case a decree would be granted, otherwise not. The respondent had not proceeded far enough in his talk with Judge Stough before he was interrupted, to acquaint him with the fact of the former hearing. The defendant's solicitors entered their appearance and filed an answer denying the allegations of the bill, and the cause was heard before Judge Stough on November 29, 1907. Weseman was again present at the hearing and had charge of the defendant's side of the case. Complainant and the same two witnesses who testified before Judge Barnes testified before Judge Stough and gave substantially the same testimony, and no other. - The defendant's solicitor did not cross-examine the witnesses or introduce any testimony and a decree was granted by Judge Stough. Shortly after the second hearing Judge Barnes became acquainted with the fact that Mrs. Epcke had filed the second bill, and he thereupon called on Judge Stough, told him of the first hearing and decree and said he thought the second decree should be vacated. This was the first information Judge Stough had that the case had been finally determined in the other court and he immediately vacated his decree. The respondent was called to Judge Stough's court room, and upon being informed that the decree had been vacated, said that in the conversation had in the corridor he wanted to tell the judge about the former hearing and he would not let him.

These facts were proved before the commissioner and were reported by him, followed by his conclusions that there was no collusion; that respondent did not wrongfully commit any fraud on the court; that it was not the strict legal duty of respondent to advise the second trial judge of the prior adjudication nor the duty of the defendant to plead it if he did not desire to do so, in the absence of a collusive agreement to keep such knowledge from the court; that if respondent was honestly convinced that his client was entitled to a decree on the facts, there being no collusion or

secret agreement between the parties, he could file a second bill, taking his chances on a plea of *res judicata* being interposed, and that the respondent did nothing which he did not have a strict legal right to do in his efforts to obtain for his client a decree of divorce. The relator excepted to the report of the commissioner and the cause has been heard and argued on said exceptions.

The question presented is whether the concealment from the chancellor of the circuit court of the prior adjudication by a chancellor of a superior court, or the failure to disclose it, was such a fraud on the court as shows the respondent to be unworthy of a license to practice law in this State. That the first decree dismissing the bill for want of equity was a final and conclusive determination of the rights of the parties is not denied; but it is argued in respondent's behalf that such defense could be considered by the chancellor only if set up by the defendant by plea, and that respondent was under no obligation to disclose to the chancellor the fact that upon the identical pleadings, after a full hearing, the issue had been determined in a court of competent jurisdiction against his client. The commissioner seems to have adopted that view, and concluded that it was not the strict legal duty of respondent to make the disclosure in the absence of a collusive agreement to keep the fact from the knowledge of the court. Of course, it required no collusive agreement to keep the chancellor in ignorance of the records of another court, of which he could have no knowledge unless their contents were brought to his attention. The argument and conclusion are based upon an entire misconception of the relation and the duty of the lawyer to his client and to the court. "The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to

correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception or permits his clients to do so. He is under no obligation to seek to obtain for those whom he represents, that which is forbidden by the law." *People v. Beattie*, 137 Ill. 553, on page 574.

Whatsoever hesitation there might be in the mind of a lawyer as to what his obligation requires of him in the way of disclosures against his client's interest, there can be no question of the duty to make the disclosure of a prior adjudication in a case like this. In christian nations marriage is not treated as a mere contract between the parties, to be suspended or dissolved at their pleasure, but rather as a status based upon public necessity and controlled by law for the benefit of society at large. (14 Cyc. 576.) The interests of society are so involved in proceedings to dissolve the marriage relation that the public is interested in such proceedings to a greater degree than in ordinary civil actions. While a divorce suit is a controversy between private parties, the interest of the public in the marriage status is concerned, and the court will regard such interest whatever attitude the parties to the suit may take. (2 Bishop on Marriage and Divorce, sec. 498.) Arising out of the public right that divorce shall be granted only for statutory and sufficient causes, the practice has uniformly been different from that recognized in other cases. A divorce will not be granted upon default or bill taken for confessed unless the charges are sustained by sufficient proof. (*Shillinger v. Shillinger*, 14 Ill. 147; *Wheeler v. Wheeler*, 18 id. 39.) It will not be granted upon consent of parties, but a cause must be proved to the satisfaction of the court, independently of the fault or confession of either party. (*Dunham v. Dunham*, 162 Ill. 589.) "In a divorce suit the interest of the State is paramount to the rights of the parties, or, in more familiar terms, the parties are not en-

titled to relief where the same would be against public policy." (1 Nelson on Divorce and Separation, sec. 8.) "Though a suit for a divorce, upon its face, is a mere controversy between the parties to the record, yet the public occupies the position of a third party. Society has an interest in every marriage, and it is the duty of the State, in the conservation of the public morals, to guard the relation and to see that the status of all applicants for its dissolution should be established." (*Way v. Way*, 64 Ill. 406, on p. 414.) In *Schmidt v. Schmidt*, 29 N. J. Eq. 496, the court said: "The divorce petition is not evidence of any fact stated in it. To permit parties in divorce suits to establish, merely by the allegations and corresponding admissions of bill or petition and answer, the facts which are necessary to give the court jurisdiction, would be to practically annul important provisions of the law, and leave to simple, unverified (and perhaps fraudulently collusive) averment and admission, facts which the legislature intended should be established by proof." In *Beazley v. Beazley*, 3 Haggard's Eccl. 639, in discussing whether or not a former divorce of one of the parties should have been pleaded, it was said: "If a fact of such magnitude had been suppressed, any sentence pronounced by the court * * * would not have been finally binding. * * * Such suppression would have rendered all the proceedings liable to impeachment. An endeavor to obtain a sentence when such material information was withheld would be unfair to the court and prejudicial to the due administration of justice." This court, in *Dunham v. Dunham*, *supra*, held that when the wife, upon a separation from her husband, goes to another State for the purpose of obtaining a divorce, and brings a suit there for that purpose without disclosing the fact that a suit is pending in this State involving the same matters, she is guilty of such fraud and deception as to invalidate the decree of divorce obtained by her in such other State. Surely the law and decisions on

these questions were well known to an attorney of more than twenty years' practice.

Counsel for respondent have cited three cases in support of their argument, *Gerber v. Gerber*, 155 Ill. 219, *Evans v. Woodsworth*, 213 id. 404, and *Wagoner v. Wagoner*, 76 Md. 311, none of which sustain their position. In *Gerber v. Gerber* the wife sought a divorce for cruelty, and in her bill alleged that she had previously filed a bill asking a divorce for cruelty but on the defendant's promise to treat her properly dismissed her bill and consented to live with him, but he again abused her and kicked her in the stomach. There was nothing to show that there was any answer to the bill or whether the dismissal was without prejudice or not, nor was there anything to show any adjudication. The answer to the second bill denied the acts of cruelty and there was a hearing. The court said that if there was such a dismissal as was a bar to the bill it should have been set up by answer and proved to constitute a defense. That was a contested case, and as the record showed no former adjudication and contained nothing from which an inference of that kind could be drawn, the statement was not improper so far as the contesting parties were concerned, but it would not affect the question of fraud by either party in not disclosing an actual existing fact or affect the action of the court in protecting the public interest. In *Evans v. Woodsworth* a bill for divorce had been dismissed and afterward a second bill was filed for the same cause, and upon default and hearing a decree of divorce was rendered against the husband. Some two and a half years later, the complainant having died in the meantime leaving property in which the husband claimed an interest, he filed a bill to set the divorce aside on the ground of fraud. The court said that the question of former adjudication was not presented in that case because the bill failed to set it up as a ground for relief, and, moreover, if the question were open it was impossible to tell from the record whether the decree

on the first bill was a bar to the other or not. The decision is therefore not in point. In *Wagoner v. Wagoner* pleas were filed setting up a former adjudication. The court held that the lack of an affidavit required by the code of Maryland made the pleas defective, and that the motion of the plaintiff to strike them out should have been sustained and the pleas would then have been amended, but for the error of the court in disregarding the plaintiff's motion the decree was reversed.

A decree dismissing a bill for divorce upon a hearing is a final decree. The parties have no right again to litigate the matters involved in that suit, and by filing a new bill try different judges until they find one who agrees with them upon the facts. The public are also interested in the finality of a decree. Neither is it consistent with the authority and dignity of the courts or of proper administration of justice that parties desiring divorce may, after their cause has been heard and determined, successively file the same bill and submit the same evidence to all the judges of the various courts having jurisdiction until one of them shall grant the relief sought. It would be the duty of the court before whom such a bill is filed after having been heard and dismissed in a court of co-ordinate jurisdiction, at once to dismiss the bill upon learning of the prior adjudication, whether it was pleaded or not. The filing of a bill in such a case is a fraudulent imposition on the court.

In this case it is manifest that both parties desired divorce. The hearing before Judge Barnes in the superior court and the dismissal of the bill were on Saturday. On the following Monday the bill was filed in the circuit court. On Tuesday the appearance of the defendant was entered and an answer filed, and on Friday the cause was brought to a hearing as if it were a bill filed in good faith for the adjudication of the rights of the parties, solicitors appearing for each party but neither advising the chancellor of the facts, which would have shown that the status of the par-

ties upon the matters shown had already been determined. While the conduct of the parties was not collusion in the legal sense, as applied in the divorce law, it was reprehensible conduct on the part of both the solicitors thus to induce the chancellor to take jurisdiction of a case which he would not have considered if informed of the truth.

The conversation which took place between Judge Stough and the respondent does not help the matter. The respondent knew that the decree was final and he at least felt some doubt about the propriety of his action. If he had any communication to make to Judge Stough in regard to the merits of the case it should have been addressed to him in open court. Respondent had no right to attempt an explanation to the judge out of court, and the judge, with a proper sense of his position in the matter, declined to hear any talk about the case. The matter was not presented in court, where alone it could be considered. The respondent's conduct is not capable of an innocent construction. His failure to disclose the former adjudication, which he knew was final, was not consistent with the good faith and fair dealing which is required to be observed by members of the bar toward the courts in which they practice. The argument that he was not acting from corrupt motives or for wrongful purposes, but in accordance with his understanding of the law, is not justified by the facts. His motive is to be determined by what he did. He did not testify before the commissioner, but it is not consistent with his statement to Judge Stough that he was going to tell him out of court about the former adjudication, for counsel to say that he did not understand that such was his duty. He could not have been ignorant of the legal effect of the first decree, and the natural inference is that if Judge Stough would not hear the case when he knew the facts he would have sought another judge. If he stated the fact in court he would take the risk of having the bill dismissed, and he did not state it. His motive was to obtain a divorce for

his client, and with a complaisant solicitor representing the defendant and desirous of the same result he knew that the knowledge of the former adjudication, which was a bar to his suit, had not and would not come to the knowledge of the chancellor. We are not willing to set up or endorse such a standard of the duty of an attorney holding our license to practice in courts of justice as is contended for by respondent and approved by the commissioner.

The exceptions are sustained, and it is ordered that the respondent, Theodore G. Case, be suspended from practicing as an attorney in this and all other courts of record of this State for the term of one year from the entry of judgment under this order.

Respondent suspended.

Mr. CHIEF JUSTICE FARMER, dissenting:

I cannot assent to the judgment in this case. In my opinion respondent should have been disbarred or the rule discharged. The opinion concedes that disbarment was not justified but by way of discipline suspends respondent for one year. I agree with the conclusion that the proof did not justify disbarment but I do not agree that it justified suspension. The whole question of respondent's guilt is one of motive, and I agree with the commissioner that the proof failed to establish any corrupt motive on the part of the respondent. Furthermore, I am opposed to the establishment of a precedent of suspension in disbarment cases. Where an attorney is proven guilty of conduct that justifies suspension for a year, it is my opinion it would not only justify but would require disbarment.

Mr. JUSTICE VICKERS: I concur in the dissenting opinion of Mr. Chief Justice FARMER.

THE PEOPLE *ex rel.* Charles S. Deneen, Governor, and William H. Stead, Attorney General, Appellants, *vs.* THE ECONOMY LIGHT AND POWER COMPANY, Appellee.

Opinion filed October 26, 1909.

1. WATERS—*general presumption where party purchases from riparian owner.* While the grantor of a riparian estate may reserve the land under the water, yet the general presumption is that the purchaser's title extends as far as the grantor owned, in both fresh and tidal waters.

2. SAME—*the owner of land on both sides of river owns bed of stream.* The owner of land on both sides of a river owns the whole of the bed of the stream to the extent of the length of his lands upon it, and his conveyance of the land carries title to the bed of the stream, in the absence of any reservation in the deed or language denoting a different boundary.

3. SAME—*distinction as to ownership of bed of navigable and non-navigable streams.* In grants upon navigable waters above tide waters the riparian owner takes title to the thread of the stream, subject to the public easement of navigation; but as to waters not navigable the title to the bed of the stream passes absolutely, free from the public easement.

4. SAME—*a meander line is not ordinarily a boundary.* With the exception of cases where monuments are erected when the meander line is run the meander line is not a boundary line, but is designed to point out the sinuosities of the bank or shore and provide a means of ascertaining the quantity of land in the fraction which is to be paid for by a purchaser.

5. SAME—*meander line provision of the act of 1839 was superseded by act of 1843.* The provision of the act of 1839 relating to the sale of canal lands, which declared that lands situated upon streams which had been meandered by the United States surveys (which included the Desplaines river) should be considered as bounded by the meander line and not by the stream, is inconsistent with the act of 1843 for the pledging of the canal lands, and, as to lands sold under the act of 1843, to procure money with which to pay the debts created thereunder, was superseded by act of 1843.

6. SAME—*the State of Illinois does not own bed of Desplaines river in lands sold under act of 1843.* In the absence of any conditions, reservations or restrictions in deeds made by the canal trustees to lands bordering upon the Desplaines river, which had been acquired by the State under the government grant of 1827

and which passed as unsold lands to the canal trustees under the conveyance by the Governor under the act of 1843, the grantees in such deeds took title to the bed of the river, and the State is not the owner thereof.

7. *SAME—party alleging that stream is navigable has burden of proving such fact.* A complainant in a bill to enjoin the construction of a dam in a stream which is alleged in the bill to be navigable has the burden of proving such navigability as a question of fact, but he is not required to show that the stream is navigable for its entire length or that its navigable portion is open for use at all times of the year.

8. *SAME—navigability is to be determined with reference to natural condition of stream.* The navigability of a stream is to be determined with reference to its natural condition, and not with reference to conditions which exist after the construction of canals or other artificial channels which add to the volume of water.

9. *SAME—vested rights cannot be destroyed by making a non-navigable stream navigable.* If a stream is non-navigable in its natural condition the State has no power to destroy, without compensation, the vested rights of riparian owners by making the stream navigable by means of artificial additions to its waters.

10. *SAME—rule where stream naturally navigable is improved.* Where a stream which is, in fact, navigable in its natural condition is improved for the purpose of enlarging its usefulness, the public have a right to enjoy the easement in its enlarged condition.

11. *SAME—the State cannot destroy riparian rights in a non-navigable stream.* The State cannot directly by its own act or indirectly through the act of an agent change an unnavigable stream to one that is navigable without compensation to riparian owners for the destruction or damaging of their rights in the bed of the stream, as such rights are as much protected by the constitution as are rights in land above the water line of the stream.

12. *SAME—riparian owners not required to forfeit rights to aid improvement of non-navigable stream.* A navigable stream may be improved or a non-navigable stream may be made navigable with funds raised by general taxation; but property fronting upon the navigable stream cannot be specially assessed for the improvement of such stream for public benefit, nor can the owners of riparian rights in the non-navigable stream be compelled to surrender their rights, without compensation, to aid in its improvement.

13. *SAME—legislature cannot destroy vested rights by declaring stream to be navigable.* If a stream is not navigable in its natural condition, vested rights of riparian owners cannot be destroyed by an act of the legislature declaring such stream to be navigable.

14. SAME—*the Sanitary District act did not declare Desplaines river to be navigable.* Section 24 of the Sanitary District act, providing that when the channel is completed and the water turned in to a certain volume “the same is hereby declared a navigable stream,” has reference only to the channel of the sanitary district, and not to the water after it leaves such channel and enters the Desplaines river.

15. SAME—*what is necessary to make stream a navigable one.* A stream, to be navigable, must in its ordinary, natural condition furnish a highway over which commerce is or may be carried on in the customary modes in which such commerce is conducted by water. (*Hubbard v. Bell*, 54 Ill. 110, and *Schulte v. Warren*, 218 id. 108, followed.)

16. SAME—*Desplaines river is not, in its natural condition, a navigable stream.* The Desplaines river, notwithstanding its occasional use as a means of transportation by the few early explorers and traders, is not, in its natural condition, a navigable stream.

17. CANALS—*an agreement for perpetual flowage is, in effect, a sale of an interest in land.* An agreement for perpetual flowage is, in effect, a sale of an interest in the land and a right of perpetual possession, and if such an agreement is made by the commissioners of the Illinois and Michigan canal, it must, under the Canal act of 1874, (*Hurd's Stat.* 1908, p. 220,) be made in accordance with the requirements of clause 8 of section 8 of such act.

18. SAME—*flowage contract of September 2, 1904, is not a perpetual license.* The flowage contract made September 2, 1904, between the commissioners of the Illinois and Michigan canal and Harold T. Griswold, and which is now assigned to the Economy Light and Power Company, is not a perpetual license, but must be regarded, in view of the other contracts executed between the parties and the statutory power of the commissioners, as being for a period of twenty years, notwithstanding the use of the word “perpetually” with reference to the said Griswold's obligation to keep the tow-path in repair.

19. SAME—*canal commissioners have power to lease “ninety-foot strip.”* The commissioners of the Illinois and Michigan canal have no power to sell any land or any portion of the “ninety-foot strip” along the canal which is now utilized in connection with the use of water power, but they have power to lease canal lands and the ninety-foot strip for not to exceed twenty years, provided that where the lease is connected with a water power it must be made under clause 6 of section 8 of the Canal act of 1874.

20. SAME—*what is meant by lease of water power.* The leases of “water power and any lands or lots connected therewith,” re-

ferred to in clause 6 of section 8 of the Canal act of 1874, and which the canal commissioners cannot lease without complying with the requirements of the statute, are leases of water power in the canal itself, and lands or lots connected therewith which the State owns and the commissioners are authorized to lease.

21. *SAME—flowage contract and lease herein involved are not a lease of water power.* The flowage contract and the lease of the "ninety-foot strip" made by the commissioners of the Illinois and Michigan canal September 2, 1904, to Harold T. Griswold, do not constitute a lease of water power and lands connected therewith, as meant by clause 6 of section 8 of the Canal act of 1874.

22. *SAME—the provision for renewal of leases applies only to leases of water power and land connected therewith.* The provision of clause 6 of section 8 of the Canal act of 1874 authorizing the commissioners to provide for an extension of its leases for a period of not to exceed twenty years, applies only to leases of "water power and lands or lots connected therewith," and has no reference to leases made by private treaty of "canal lands and lots owned by the State," as mentioned in clause 5 of said section.

23. *SAME—provision for renewal in lease of September 2, 1904, does not render entire contract void.* The provision for renewal, contained in the lease of September 2, 1904, made by the commissioners of the Illinois and Michigan canal to Harold T. Griswold, is void as being unauthorized by law; but its invalidity does not render the entire contract void, since such provision is an independent and severable covenant, which may be disregarded and the legal portion of the contract enforced.

24. *SAME—what is not ground for setting aside deed to canal lands.* The fact that a sale of canal lands was made by a third person acting at the request of the commissioners instead of by the commissioners in person is a mere irregularity which is not ground for setting aside the deed, where the land was sold in accordance with the formalities required by statute, a deed executed to the purchaser and the purchase money received and retained by the State, which was, in legal contemplation, the grantor in the deed, and where no steps were taken to avoid the sale while the title was in the original purchaser, whose record title was clear.

25. *SAME—the deed of January 6, 1905, to "sixteen-acre tract" passed entire title of State.* The quit-claim deed of January 6, 1905, from the commissioners of the Illinois and Michigan canal to Harold T. Griswold, conveying the so-called "sixteen-acre tract," was not a conveyance of any land connected with the water power of the canal but of land the commissioners had power to sell, and such deed was effective to convey the entire interest then owned by the State in such tract.

26. SAME—the “Kankakee feeder” lease of August 8, 1905, is not a water power lease. The “Kankakee feeder” lease, made August 8, 1905, between the commissioners of the Illinois and Michigan canal and Harold T. Griswold, is not a lease of water power, within the meaning of clause 6 of section 8 of Canal act of 1874.

27. SAME—revocation provision of the “Kankakee feeder” lease construed. The provision of the “Kankakee feeder” lease, (herein involved,) reserving the right to the canal commissioners to cancel the lease “whenever, in the judgment of the canal commissioners or other proper officers of the State at such time having charge of canal property, they shall deem the interests of the State require it, to re-possess and use said property,” means the canal commissioners or such officers as the State may designate to have charge of the canal property in the place of the commissioners, and does not mean the legislature.

28. SAME—when lease cannot be canceled except by canal commissioners. The right of one party to the “Kankakee feeder” lease of August 8, 1905, to declare the contract at an end without the consent of the other party must be strictly construed, and as long as the State continues the canal commissioners in charge of canal property, such commissioners are the only officers who may, under the contract, cancel such lease, and their discretion in that regard cannot be exercised by State officials in another department of the State government.

29. SAME—“Kankakee feeder” lease is not within joint resolution of 1907. The joint resolution of the legislature adopted on November 27, 1907, is directed against certain leases made by the canal commissioners on September 2, 1904, and does not include the “Kankakee feeder” lease, which was executed August 8, 1905.

30. SAME—canal commissioners may lease Kankakee feeder. The commissioners of the Illinois and Michigan canal may treat the abandoned Kankakee feeder, and the lands and lots connected therewith, as other canal property, and may lease the same, during such time as it is not needed, for any lawful purpose which does not interfere with any right which the State may have to resume the use of such feeder for canal purposes.

31. SAME—the “pole lease” of September 2, 1904, is not void. The “pole lease,” executed between the canal commissioners and Harold T. Griswold September 2, 1904, does not give to the said Griswold control of the tow-path of the canal for the length of the line, but merely gives him the right to place poles under the direction of the commissioners, and there is no ground for declaring such contract void unless the line of poles erected thereunder interferes with the use of the tow-path and canal.

32. *CONTRACTS*—a contract by canal commissioners should be read in the light of the statute. Where a flowage contract made by the canal commissioners specifies no time for its duration it must be inferred that the contract was made with reference to the statute under which the commissioners were acting, and the contract should be read in the light of such statute, and, if it is possible, such a construction should be given the contract as to render it valid rather than one which destroys it.

33. *SAME*—rule where one attempts to grant a greater estate than he has. Where one attempts to grant a greater estate than he has, the conveyance will be effective to pass the estate which he has though the grant may be inoperative as to the greater estate.

34. *SAME*—contemporaneous agreements should be construed together. Where different instruments are executed at the same time between the same parties with reference to the same subject matter, all of the instruments should be construed together in determining the real intention of the parties.

APPEAL from the Circuit Court of Grundy county; the Hon. JULIAN W. MACK, Judge, presiding.

WILLIAM H. STEAD, Attorney General, and JOEL C. FITCH, Assistant Attorney General, (WALTER REEVES, and MERRITT STARR, special counsel,) for the appellant:

The flowage contract, granting the right to flood the ninety-foot strip, the tow-path bank and the riparian tract in perpetuity, is a sale of real estate. *Woodward v. Seely*, 11 Ill. 157; *Water Power Co. v. Evans*, 166 id. 548; *Nellis v. Munson*, 108 N. Y. 453; *Mumford v. Whitney*, 15 Wend. 381; *Cook v. Stearns*, 11 Mass. 533; *Fitch v. Hydraulic Co.* 44 Mich. 76.

Even a license to erect a permanent dam on another's land or to overflow another's land must be by deed, for it is the sale of an estate in land. *Brown v. Woodworth*, 5 Barb. 550; *Houghtaling v. Houghtaling*, id. 379; *Davis v. Townsend*, 10 id. 338.

The interest purported to be conveyed by the flowage contract is perpetual. No words of inheritance are necessary to the creation of a perpetual right of flowage. *Cole*

v. *Lake County*, 54 N. H. 242; *Clark v. Strong*, 105 N. Y. App. Div. 179; *Sweetland v. Power Co.* 46 Ore. 85.

The flowage contract, if valid, conveys an estate, which precludes the grantor from any use inconsistent with the beneficial exercise of the flowage right. *Phillips v. Reservoir Co.* 108 Mass. 404; *Woodward v. Seely*, 11 Ill. 164.

The flowage contract, as such sale violates the statute forbidding a sale of canal real estate except upon advertisement and to the highest bidder, is void. Rev. Stat. chap. 19, sec. 8; Laws of 1899, p. 82.

The flowage contract was beyond the powers of the canal commissioners and is void. The power to make this contract is not conferred upon the commissioners. 4 Starr & Cur. Stat. chap. 19.

Acts of the commissioners not within the terms of the statutes are void. *Canal Comrs. v. Calhoun*, 1 Scam. 521; *State v. Delafield*, 8 Paige's Ch. 528; *Diederich v. Rose*, 228 Ill. 610.

The grants of the commissioners in derogation of public rights are strictly construed and not extended by implication. *Charles River Bridge v. Warren Bridge*, 11 Pet. 426; *Snell v. Chicago*, 133 Ill. 439.

Clause 9 of the flowage contract in express terms authorizes the invasion of the canal. This subordinates the public property to private purposes and is illegal and beyond the power of the canal commissioners. The flowage contract is therefore illegal and void. *Synder v. Mt. Pulaski*, 176 Ill. 397; *Morrison v. Hinkson*, 87 id. 587; *Attorney General v. Forbes*, 2 M. & C. 123; *Frewen v. Lewis*, 4 id. 249.

The canal leases are illegal and void. They contain renewal clauses for a second term of twenty years. Canal leases are limited by statute to twenty years. 4 Starr & Cur. Stat. chap. 19, sec. 8, clause 5.

The renewal clause amounts, in itself, to making the lease for extended term. *Noonan v. Orton*, 27 West. 300.

Inasmuch as the leases attempt to grant a term of longer than twenty years they are void. *Canal Comrs. v. Calhoun*, 1 Scam. 521; *Diederich v. Rose*, 228 Ill. 610; *State v. Delafield*, 8 Paige's Ch. 528.

The lease for the purpose of flooding the ninety-foot strip and tow-path bank for several miles endangers the canal and is an invasion of part of the canal. The berm bank of the canal is part thereof, and is equally protected by law from all occupancy or intrusion as any other part. *Ohio v. Railroad Co.* 37 Ohio St. 157.

The foot-path or tow-path, and strip of land occupied by it, along the canal, is part of the canal. *Alexander v. Tolleston Club*, 110 Ill. 65; *Morgan v. Bass*, 14 Fed. Rep. 454; *Edwards v. Schlund*, 21 Ohio St. 193; *Canal Co. v. Harris*, 101 Pa. 80.

The ninety-foot strip, the tow-path and the berm bank are integral parts of the canal, and cannot be leased or put to any use or subjected to any burden other than for canal purposes. The leasing of several miles of the ninety-foot strip and tow-path bank being for private purposes is therefore illegal. *Ohio v. Railroad Co.* 37 Ohio St. 157.

The canal commissioners hold the canal, with all its incidents, in trust for public uses, and can grant no easement therein for the benefit of private parties and to the exclusion of the public. *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Field v. Barling*, 149 id. 556; *Hibbard v. Chicago*, 173 id. 91; *Driggs v. Phillips*, 103 N. Y. 77; *Smith v. State*, 23 N. J. L. 712; *Attorney General v. Heishon*, 18 N. J. Eq. 410; *State v. Woodward*, 24 Vt. 92.

The power conferred on these officers is limited to public purposes and must be expressed and cannot be exceeded. Any fair, reasonable doubt concerning the existence of the power of public officers to devote public property to questionable uses is resolved by the courts against the corporation and the power is denied. 1 Dillon on Mun. Corp. secs. 55, 251; *Emmons v. Lewistown*, 132 Ill. 380; *Chi-*

cago v. McCoy, 136 id. 344; *Cairo v. Bross*, 101 id. 475; *Huesing v. Rock Island*, 128 id. 465.

The Kankakee feeder lease has been canceled. The lease expressly reserved to the canal commissioners the right to cancel. The effect of the act of the General Assembly of December 6, 1907, (Laws of 1907, p. 32,) was to exercise this right of cancellation. The legislature may exercise such right. *Laramie County v. Albany Co.* 92 U. S. 307; *Russell v. Reed*, 27 Pa. St. 170.

The Kankakee feeder lease is a water power lease, and is void because it violates the provision of the statute requiring public letting of water power to the highest bidder. 4 Starr & Cur. Stat. chap. 19, sec. 8, clauses 6, 7.

The fact that the feeder was out of use and out of repair does not confer authority to sell it, lease it or give it away. The title to the feeder lands does not revert or leave the State by non-user. *Rexford v. Knight*, 11 N. Y. 308; *Frank v. Evansville Co.* 111 Ind. 132; *Mason v. Railway Co.* 1 Fed. Rep. 712; *Craig v. Allegheny*, 53 Pa. St. 477; *White v. State*, 14 Ohio, 468.

No length of non-user will extinguish the rights of the State in the canal property. *Curran v. Louisville*, 83 Ky. 628; *Donahue v. State*, 112 N. Y. 142; *State v. Doig*, 2 Rich. 179.

The sale of the canal lands was made by an employee of the canal commissioners, in the absence of all the commissioners and without any authority conferred upon him, and was void. *Mason v. Wait*, 4 Scam. 127; *Sebastian v. Johnson*, 72 Ill. 282; *Heyer v. Deaves*, 2 Johns. Ch. 154; *Powell v. Tuttle*, 3 N. Y. 396; *Moss v. Peary*, 2 Pat. & H. 483; *Noland v. Noland's Admr.* 75 Ky. 426; *Bickerton v. Grimes*, 8 Wash. 451; *Cheatham v. Phillips*, 23 Ark. 80.

The deed of the riparian tract is void. Inasmuch as the sale of this tract is void the deed made in pursuance of that sale is void. The deed expressly renews the void covenants of the canal commissioners in the void flowage con-

tract, and is therefore void. The deed is subject to the reserve of the flowage right, which (because the flowage contract is void) never left the canal commissioners. It therefore failed to take effect. The entire series of contracts is against public policy and void. *Crawford v. Wick*, 18 Ohio St. 190; *Holloday v. Patterson*, 5 Ore. 177; *Richardson v. Crandall*, 48 N. Y. 343.

A contract which in its execution will contravene the policy and spirit of a statute is equally void as if made against its positive provisions. *Diederich v. Rose*, 228 Ill. 610; *Gunther v. Dewine*, 11 Iowa, 133; *Dement v. Rokker*, 126 Ill. 174.

The State of Illinois owns the bed of the Desplaines river, and some adjoining land on each side thereof, at the site of the proposed dam and power house of the defendant, the Economy Light and Power Company, together with the water of the river. The act of 1839 makes the meander line the boundary of the lands at the site of the proposed dam and reserves the bed of the river to the State. The purpose and effect of this act was to change, with reference to canal lands, the rule that the riparian owner takes to the center thread of the stream, and to make the meander line the boundary of canal lands situated on meandered streams, conveyed by canal deeds. This provision of the act of 1839 has not been expressly repealed. It has not been repealed by implication, because no subsequent acts of the legislature are inconsistent with it or repugnant to it. It is essential to a repeal by implication that the repugnance between the statutes must be so clear and plain that they cannot be reconciled. *East St. Louis v. Maxwell*, 99 Ill. 439; *Harding v. Railroad Co.* 65 id. 93; *Hume v. Gossett*, 43 id. 299; *Supervisors v. Campbell*, 42 id. 492; *People v. Barr*, 44 id. 201; *Fowler v. Pirkins*, 77 id. 274; *Ottawa v. LaSalle*, 12 id. 339; *Hyde Park v. Cemetery Ass.* 119 id. 141; *Tyson v. Postlethwaite*, 13 id. 141; *Hunt v. Railway Co.* 121 id. 638.

There is no conflict between the act of 1839 and the act of 1843. The former is permanent, the latter is temporary. The evidence shows that the Desplaines river was meandered through the south-east quarter of section 25, in which the proposed dam is located. That part of the south-east quarter section outside of the meander line is large enough to exclude it from a grant of the land within the meander line. *Houck v. Yates*, 82 Ill. 542; *Fuller v. Dauphin*, 124 id. 542; *Canal Trustees v. Haven*, 5 Gilm. 548; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Fuller v. Shedd*, 161 Ill. 462.

The canal legislation shows several renewals of the act of 1839 and a legislative intent and policy to keep it in force. The act of February 26, 1839, amends "the several laws in relation to the Illinois and Michigan canal," and enacts the meander line into a true boundary and forbids a sale of the bed of the stream in canal lands. This amendment therefore became a part of the said "several laws in relation to the Illinois and Michigan canal." *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, id. 385; Endlich on Statutes, sec. 294; *Blair v. Chicago*, 201 U. S. 400; *Regina v. Overseers*, 3 El. & El. (107 E. C. L.) 224.

The several canal acts heretofore cited, reserving to the State all the waters and streams, reserve title to the waters of the Desplaines. The State owning the water, owns it in trust for the whole people for the paramount right of navigation, and, subject thereto, the flow thereof in trust for the riparian owners. *Railroad Co. v. People*, 214 Ill. 9; *Druley v. Adam*, 102 id. 193; *People v. Canal Appraisers*, 33 N. Y. 461.

Grants of lands under or around a navigable stream imply no intent to discontinue the public right therein. *Lumber Co. v. Olcott*, 65 N. H. 380; *Shively v. Bowlby*, 152 U. S. 10; *Thompson v. River Co.* 58 N. H. 1.

The Boyer deed should not be construed to convey the bed of the stream, because grants in derogation of public

rights are to be strictly construed and not extended by implication. *Charles River Bridge v. Warren Bridge*, 11 Pet. 426; *Snell v. Chicago*, 133 Ill. 439.

In a grant of property, franchises or privileges in which the government or public is interested, all doubts are resolved in favor of the State. Nothing passes by mere implication. *Mining Co. v. South Carolina*, 144 U. S. 550; *Railroad Co. v. Packet Co.* 125 id. 260; *Stein v. Water Co.* 141 id. 67; *Holyoke Co. v. Lyman*, 15 Wall. 500.

A grant by the State of the right to maintain a dam in a navigable stream, while valid so long as Congress has not acted, is subject to the right of Congress to interfere in the matter whenever it may deem necessary to do so. *Pound v. Turck*, 95 U. S. 459.

It follows that all doubts as to the repeal of the meander line provision of the act of 1839 should be resolved in favor of the State and that provision be held not to have been repealed. The burden rests with the defendant to prove its right to build and maintain the dam. *Railway Co. v. Railway Co.* 37 Fed. Rep. 129; *Railway Co. v. Parsons*, 74 id. 408; *Doxsey v. Railroad Co.* 35 Hun, 362; *Cantrell v. Railroad Co.* 90 Tenn. 638.

The Desplaines river is a navigable stream. A navigable stream is a stream having sufficient depth of water to afford a channel for useful commerce. *Schulte v. Warren*, 218 Ill. 108; *People v. St. Louis*, 5 Gilm. 351; *Railway Co. v. Healy*, 94 Ill. 416; *Ligare v. Railroad Co.* 139 id. 46; *Houck v. Yates*, 82 id. 179; *Chicago v. McGinn*, 51 id. 66; *Railroad Co. v. Stein*, 75 id. 41; *Ice Co. v. Shortall*, 101 id. 46; *Chicago v. Law*, 144 id. 569; *Geneseo Chief v. Fitzhugh*, 12 How. 443.

A stream which can be used is navigable. *Commonwealth v. Vincent*, 108 Mass. 441.

If it can be used at certain seasons by barges it is navigable. *Bucki v. Cone*, 25 Fla. 1; *Brodnax v. Baker*, 94 N. C. 675.

Where streams are of sufficient depth, naturally, for valuable navigation by flat-boats and small vessels of light draft, the public has the right to a free enjoyment of the streams for the purpose of navigation to which they are naturally adapted. *Goodwill v. Police Jury*, 38 La. Ann. 752; *Webster v. Harris*, 59 L. R. A. 324; *State v. Baum*, 128 N. C. 600; *Tuscaloosa County v. Foster*, 132 Ala. 392.

Pecuniary profit is not an essential of navigability. *Attorney General v. Woods*, 108 Mass. 436; *Lamphrey v. State*, 52 Minn. 181.

All waters practically available for floating commerce by any method are navigable, as the servitude of public interests depends rather on the purpose for which the public requires the use than any particular mode of use. *Moore v. Sanborne*, 2 Mich. 519.

"Commerce" is not confined to the transportation of freight. Travel by persons and the transportation of persons by boats is "commerce." *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger cases*, 7 How. 286.

Commerce is intercourse. It includes the intercourse and all the initiatory and intervening acts, instrumentalities, dealings, means and appliances. *Brennan v. Titusville*, 153 U. S. 289; *Hall v. DeCuir*, 95 id. 485; *McNaughton v. McGirl*, 20 Mont. 124.

The early travel on the Desplaines river was commerce. The observation in *Hubbard v. Bell*, 54 Ill. 110, that a stream having sufficient capacity merely to float logs is not a navigable stream is dictum, was uncalled for, and is erroneous. The former dams and bridges crossing the river do not change its character or prevent its navigation. *Railroad Co. v. People*, 214 Ill. 9; *Clarke v. Lake*, 1 Scam. 229.

The two existing dams at Marseilles and Joliet are subject to removal by the State for navigation purposes, and therefore the navigability of the river is to be determined independently of their presence. Removable difficulties and partial limitations do not control navigability. The exist-

ence of obstructions and interruptions is not controlling. *Montello case*, 20 Wall. 430; *Water Power Co. v. Water Comrs.* 168 U. S. 349; *In re State Reservation at Niagara Falls*, 37 Hun, 537; *Brodnax v. Baker*, 94 N. C. 675; *Attorney General v. Harrison*, 12 Grant's Ch. 466; *Goodwill v. Police Jury*, 38 La. Ann. 752; *Inhabitants of Charleston v. Middlesex County Comrs.* 44 Mass. 202; *State v. Bell*, 5 Port. 365.

The existence of artificial obstructions, such as dams, bridges and fences, does not deprive the stream of its character nor the public of its rights. *Clarke v. Lake*, 1 Scam. 229; *Railroad Co. v. People*, 214 Ill. 9.

A stream need not be navigable in its entirety. *Schulte v. Warren*, 218 Ill. 108; *Spooner v. McConnell*, 1 McLean, 337; *Hempstead v. New York*, 52 N. Y. (App. Div.) 182.

It is not necessary that the stream be navigable all the year round. *Cummins v. Spruance*, 4 Harr. 315; *Colchester v. Brook*, 7 Queen's Div. 339.

Interruption by ice in the winter months, it was early settled, did not destroy navigability, and this court put low water in summer and closure by ice in the winter on the same footing. *Packet Co. v. Bridge Ass.* 38 Ill. 467.

Capacity for navigation in a period sufficiently regular and continued to make the stream available for travel or commerce is sufficient. *Walker v. Allen*, 72 Ala. 456; *Berk Co. v. Lumber Co.* 116 N. C. 731; *Railroad Co. v. Brooks*, 39 Ark. 403; *Pierpont v. Loveless*, 72 N. Y. 211; *Smith v. Fonda*, 64 Miss. 551; *Thunder Bay Co. v. Specchly*, 31 Mich. 336.

Actual use is not necessary—capacity for use is sufficient. *The Daniel Ball*, 10 Wall. 557; *Hickok v. Hine*, 23 Ohio St. 523; *Attorney General v. Eau Claire*, 37 Wis. 400; *Heyward v. Farmers' Mining Co.* 42 S. C. 138.

It is not necessary that it be navigable up-stream,—that is, against the current. 1 Farnham on Waters, sec. 25; Angell on Highways, 45; *Sigler v. State*, 7 Baxt. 493;

TenEyck v. Warwick, 75 Hun, 562; *Manufacturing Co. v. Railroad Co.* 117 N. C. 579; *Pipe Line Co. v. Railroad Co.* 10 Abb. 107.

A stream is navigable "if of sufficient capacity to float the products of the mines, the forests or the tillage of the country through which they float, to market." *Lewis v. Coffee County*, 77 Ala. 190; *Sullivan v. Spotswood*, 82 id. 163; *Webster v. Harris*, 69 S. W. Rep. 782.

The fact that there is no present use and no present injury is immaterial. *Attorney General v. Smith*, 109 Wis. 532; *People v. St. Louis*, 5 Gilm. 368.

Future development of the country must be considered as well as present or past use. *Jones v. Johnson*, 6 Tex. Civ. App. 262.

The public right is not lost by non-user. No length of time will substantiate the right to exclude the public from the use of the stream. No right can be acquired by prescription which will interfere with this right of navigation. *Beidler v. Sanitary District*, 211 Ill. 628; *Parker v. People*, 111 id. 581; *Alton v. Transportation Co.* 12 id. 38; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charleston*, 1 Pick. 180; *Canal Co. v. Harris*, 101 Pa. St. 80; *Burbank v. Fay*, 5 Lans. 397; *Attorney General v. Cooper Co.* 152 Mass. 444.

The public right in a navigable water-course is non-alienable. *Railroad Co. v. People*, 214 Ill. 9; *Cox v. State*, 3 Blackf. 193.

Statutes declaring streams navigable are competent to define the standard of navigability, and *prima facie* establish the public character of the stream. *Clarke v. Lake*, 1 Scam. 229; *Coover v. O'Connor*, 8 Watts, 476; *Canal Co. v. Landis*, 9 id. 228; *Horton v. Pace*, 9 Tex. 1; *Harrison v. Holland*, 3 Gratt. 247.

If a stream is navigable for part of the time it will be regarded as a navigable stream when so declared by the legislature. *State v. Dibble*, 49 N. C. 107; *Davis v. Jer-*

kings, 50 id. 290; *Baker v. Lewis*, 33 Pa. 301; *Denton v. State*, 76 N. Y. Sup. 167; *Cooper v. Hall*, 5 Ohio, 320; *White v. Jefcote*, 10 Rich. L. 389; *Selman v. Wolfe*, 27 Tex. 68.

The court will take judicial notice of the existence of rivers and creeks emptying into the Illinois river, and of the fact that they carry large quantities of sand, sediment and debris into such river and that still the Illinois river is a navigable river. *Canal Comrs. v. East Peoria*, 179 Ill. 214.

The variable and progressive development of navigation does not destroy the public right in streams originally navigable. An existing public right of navigation is not lost by changes in the condition or use of the stream. *Attorney General v. Eau Claire*, 37 Wis. 400; *People v. Page*, 39 N. Y. (App. Div.) 110.

No intention will be implied to discontinue the right of way in the stream. *Lumber Co. v. Olcott Falls Co.* 64 N. H. 290.

Changes in the stream, increasing its depth and improving the navigation, enlarge the right of navigation, and a stream so improved is to be considered in its latter capacity. *Schulte v. Warren*, 218 Ill. 108.

The waters of Lake Michigan added to the Desplaines river by the sanitary district channel lawfully and permanently improved the navigation of the river, and its navigability is to be judged as so lawfully and permanently improved. *Schulte v. Warren*, 218 Ill. 108; *Mendota Club v. Anderson*, 101 Wis. 479; *Smith v. Youman*, 96 id. 103; *Pewaukee v. Savoy*, 103 id. 271.

ISHAM, LINCOLN & BEALE, and SCOTT, BANCROFT & STEPHENS, (JOHN P. WILSON, FRANK H. SCOTT, and GILBERT E. PORTER, of counsel,) for appellee:

Meander lines are not boundaries, but are run for the purpose of defining the sinuosities of the banks. They do not limit the title of the riparian owner. *Ross v. Faust*,

54 Ind. 471; *Whitaker v. McBride*, 197 U. S. 510; *Canal Trustees v. Haven*, 5 Gilm. 548; *Bridge Co. v. People*, 197 Ill. 199; *Schurmeier v. Railroad Co.* 10 Minn. 82; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Houck v. Yates*, 82 Ill. 179; *Orn v. Smith*, 159 U. S. 40.

The act of 1839 did not apply to canal lands generally, but only to those authorized to be sold prior to that date. The act of 1843 was a conveyance, by way of mortgage, of all the canal properties, unaffected by any of the provisions of the act of 1839.

The attitude of the State since the passage of the act of February 26, 1839, has been uniformly inconsistent with the claim that the title to the bed of the stream was reserved by it. The deed from the canal trustee to Boyer contained no reservation of the bed of the stream, and under well settled rules of construction his deed carried the bed of the stream. *Braxton v. Bressler*, 64 Ill. 488; *Bridge Co. v. People*, 197 id. 199; *Trustees v. Schroll*, 120 id. 509; *Piper v. Connelly*, 108 id. 646; *Bridge Co. v. Johnson*, 188 id. 472.

A party to a contract cannot pronounce its own deed invalid although that party be a sovereign State. *Fletcher v. Peck*, 6 Cranch, 87.

The reports of the canal trustees and canal commissioners show that the bed of the stream was not reserved. This court has held that the bed of the stream in odd numbered sections belongs to the riparian owner. *Chicago v. VanIngen*, 152 Ill. 624; *Druley v. Adam*, 102 id. 177.

The claim of the State to the bed of the stream is stale, and the rule of *laches* applies in equity to a sovereign State with reference to its proprietary interests, the same as it does to its citizens. *United States v. Chandler-Dunbar Co.* 152 Fed. Rep. 25.

The Desplaines river is not a navigable stream. To be navigable a stream must, in its natural condition and at its ordinary volume of water, afford a channel for useful

commerce. *Canal Trustees v. Haven*, 5 Gilm. 548; *Hubbard v. Bell*, 54 Ill. 110; *Schulte v. Warren*, 218 id. 108; *Railroad Co. v. Healy*, 94 id. 416; *Healy v. Railroad Co.* 116 U. S. 191; *Rowe v. Bridge Corporation*, 21 Pick. 344; *Weathersfield v. Humphrey*, 20 Conn. 217; *Harrison v. Fite*, 148 Fed. Rep. 78.

Depth alone is not the test. *Little Rock v. Brooks*, 39 Ark. 403; *Harrison v. Fite*, 148 Fed. Rep. 78; *State v. Gilmanton*, 14 N. H. 457.

We do not claim that the stream must be navigable in its entirety, nor that obstructions and interruptions render an otherwise navigable stream unnavigable.

The *Montello case*, 20 Wall. 430, *Water Power Co. v. Water Comrs.* 168 U. S. 349, *In re State Reservation at Niagara Falls*, 16 Abb. 159, and *Brodnax v. Baker*, 94 N. C. 675, cited by counsel, involved large rivers which were intercepted by falls, but which were in common use as highways for useful commerce both above and below the falls.

The navigability of a stream is to be determined by its natural condition and ordinary volume of water, without the necessity of any improvement or artificial aid. *Thunder Bay Co. v. Speechly*, 31 Mich. 36; *Druley v. Adam*, 102 Ill. 177; *Pearson v. Rolfe*, 76 Me. 380; *Hall v. Lacy*, 3 Grant's Cas. 264; *Morgan v. King*, 35 N. Y. 454; *Carter v. Thurston*, 42 Am. Rep. 584; *Lewis v. Coffee County*, 77 Ala. 190; *Morrison Bros. v. Colemand*, 87 id. 655; *Coapman v. Blodgett*, 70 Mich. 610; *Stratton v. Currier*, 81 Me. 497.

The burden of proof of navigability is upon the party asserting it. *Ligare v. Railroad Co.* 166 Ill. 249; *Olive v. State*, 86 Ala. 88; *Gaston v. Mace*, 33 W. Va. 14.

The navigability of the Desplaines river is not to be determined by its capacity as improved by the addition of waters by the sanitary district. Changes in the art of navigation cannot affect the titles of riparian owners. *Railway Co. v. People*, 214 Ill. 9, *Schulte v. Warren*, 218 id. 108,

and *Mendota Club v. Anderson*, 101 Wis. 479, cited by counsel, do not hold to the contrary.

Neither the construction of the sanitary district channel nor the act authorizing it affected the defendant's water power rights. *Railroad Co. v. Sanitary District*, 218 Ill. 294; *Druley v. Adam*, 102 id. 177; *Tourtelotte v. Phelps*, 4 Gray, 370; *Lovington v. St. Clair County*, 64 Ill. 56; *Chicago v. Laughlin*, 49 id. 172; *Beidler v. Sanitary District*, 211 id. 628.

A stream which is in its natural condition not navigable cannot be made so by legislative action, to the detriment of the vested interests of riparian owners. *Ronayne v. Loranger*, 66 Mich. 73; *Walker v. Board of Public Works*, 16 Ohio, 540; *Murray v. Preston*, 106 Ky. 561.

The flowage contract and the lease of the riparian tract do not constitute a water power lease, within the meaning of section 8 of the act of March 27, 1874. The ninety-foot strip is not an integral part of the canal and was subject to be leased. *Canal Trustees v. Railroad Co.* 14 Ill. 314.

The deed to Griswold of January 6, 1905, was valid. The main ground upon which the attack upon the deed is based is that none of the commissioners were present at the time of the sale. This is not alleged or relied on in the bill, and the complainant cannot have relief upon grounds other than those upon which the bill proceeded. *Vennum v. Vennum*, 61 Ill. 331; *House v. Davis*, 60 id. 367; *Heath v. Hall*, 60 id. 344; *Randolph v. Onstott*, 58 id. 52.

Appellee, as an innocent purchaser from the grantee at the commissioners' sale, would not have been affected even though the conduct of the sale had been irregular. *Linnertz v. Quilty*, 191 Ill. 174; *McHany v. Schenk*, 88 id. 365; *Chambers v. Jones*, 72 id. 275.

The flowage contract was not in perpetuity. *DeFlores v. Reynolds*, 8 Fed. Rep. 434; *People v. Telephone Co.* 220 Ill. 238; *People v. Telephone Co.* 232 id. 260; *Blair v. Chicago*, 201 U. S. 400.

The contracts and leases, so far as they affect the Kankakee feeder, are valid and binding. *Hubbard v. Toledo*, 21 Ohio St. 379.

MR. JUSTICE VICKERS delivered the opinion of the court :

This is a direct appeal to this court from a decree of the circuit court of Grundy county dismissing for want of equity an information in the nature of a bill in equity filed by the Attorney General on behalf of the People, on the relation of Charles S. Deneen, Governor of the State of Illinois, against the Economy Light and Power Company, to restrain said company from erecting a dam across the Desplaines river and to cause the removal of that portion of the dam already constructed, and to prevent other injuries to the property of the State which it is alleged will result from the construction and maintenance of said dam.

Appellant bases its claim to relief on three propositions, as follows: (1) That the State of Illinois owns the bed of the river at the point where it is proposed to build said dam; (2) that the Desplaines river is a navigable stream, and that the proposed dam would constitute an obstruction to navigation; (3) that certain contracts executed by the commissioners of the Illinois and Michigan canal, under which appellee claims certain rights in connection with the construction of said dam, are void, and that no rights were acquired by or can be asserted under said contracts.

It is conceded by appellee that if the State of Illinois owns the fee in the bed of the Desplaines river at the point where the proposed dam is to be located, or if said river is a navigable stream at that point, appellee has no right to build the dam. Whether the same result would follow if the instruments referred to in the third proposition were held invalid is one of the controverted questions between the parties. The questions involved in each of appellant's propositions arise out of facts which have but little, if any, bearing on the other contentions. It will therefore conduce

to a clearer understanding to examine these propositions separately, in the light of the facts applicable to each.

THE TITLE OF THE STATE TO BED OF THE RIVER.—The validity of appellant's claim of title to the bed of the river at the point where the dam is located depends upon the construction of certain statutes passed by the legislature in relation to the Illinois and Michigan canal. The consideration of the legal questions involved in appellant's claim of title to the bed of the river will be facilitated and the ultimate result clarified by a brief review of the history of the Illinois and Michigan canal prior to the passage of the particular statute a construction of which is involved in this question.

The possibility of connecting the waters of Lake Michigan with the Illinois river by means of an artificial channel, thence through the Mississippi river to the Gulf of Mexico, thus establishing a continuous waterway for commerce from the lakes on the north to the gulf on the south, was at a very early time appreciated and its consummation cherished by the early traders and explorers as a work of first importance, both from a commercial and military standpoint. The portage between the south branch of the Chicago river and the Desplaines was only a few miles, and it was confidently believed that these two streams could be connected by an artificial channel at a cost that would be trifling in comparison with the commercial benefits that were expected to result. Experience has shown, however, that the cost of the canal, first and last, has been nearly twenty times the original estimate and that its practical benefits have fallen much below its promoters' expectations. The subject of constructing the canal was first brought to the attention of the Federal Congress in 1801 by Albert Gallatin, in a report recommending its construction by the general government. In 1816 a government survey was made of the proposed route, and after Illinois was admitted into the Union the attention of the new State was turned to the

proposed connecting waterway. In 1822 Congress passed an act authorizing the State of Illinois to survey and mark through the public lands of the United States the route of a canal connecting the Illinois river with the southern bend of Lake Michigan, and vesting in the State the perpetual use of a strip of land ninety feet wide on each side of said canal for canal purposes, subject to certain conditions which have either been complied with or waived by subsequent acts and therefore need not be stated. (Stead's Canal Laws, p. 1.)

During an extra session of the Illinois legislature, in 1826, a memorial was addressed to the Congress of the United States in which the great advantages, both to the nation and the State, of the proposed canal were eloquently set forth and the liberality of Congress was appealed to to make a grant of public lands to aid the State "to commence and complete this great and useful work." In this memorial it was stated that "your memorialists have caused the route to be explored and estimates to be made of the probable expense of the work, from which it appears that the cost of constructing the canal will not be less than \$600,000 and may possibly amount to \$700,000." The effect of this memorial was to attract the attention and awaken the generous patronage of the Federal Congress, and on March 2, 1827, an act was passed granting to the State of Illinois, for the purposes stated, a quantity of land equal to one-half of five sections in width on each side of said canal, from one end thereof to the other. The lands thus granted to the State, when selected and set apart, were found to contain approximately 300,000 acres, which were subject to the disposal of the State legislature "for the purposes aforesaid and no other." In 1829 the legislature passed an act authorizing the appointment of a board of canal commissioners to explore, examine, fix and determine the route of the canal, and dispose, by sale, of the lands and lots and commence the work. Under this act Gov. Edwards appointed Charles

Dunn, Dr. Gersham Jayne and Edmond Roberts as commissioners. For lack of funds the commissioners were able to accomplish but little. February 15, 1831, an amendatory act was passed. Under the provisions of these two acts the board of commissioners laid out the towns of Chicago and Ottawa and caused a new survey and estimate to be made by engineer Bucklin, whose estimate showed that the canal, instead of costing \$600,000 or \$700,000, as the legislature had stated in its memorial, would cost \$4,043,386.50,—and this estimate proved to be too low by half. In view of the unexpected increase in the cost of the canal the plan of substituting a railroad for the canal was favorably considered for a time, and with this in view a survey and estimate for the railroad were made, a law passed abolishing the office of canal commissioners and the consent of the Federal government to use the land granted in constructing a railroad instead of a canal was obtained.

In 1835 the canal proposition was again taken up and an act passed authorizing the Governor to negotiate a loan, not exceeding \$500,000, solely on the pledge of the canal lands and tolls. Certificates were to be issued, called "Illinois and Michigan canal stock," which were to be sold at not less than face value. This effort to raise money proved a failure. Ex-Gov. Coles, who then resided at Philadelphia, was appointed agent of the State to negotiate the loan, and in April, 1835, he wrote that capitalists were unwilling to take the stock certificates because they were not based upon the faith of the State. To obviate the objections thus raised the act of January 9, 1836, was passed, which repealed the act of 1835 and authorized the same loan of \$500,000 on the credit of the State, which was irrevocably pledged for the payment of both principal and interest. The money thus borrowed, together with the proceeds of canal lands and lots, constituted a fund with which the actual construction of the canal was commenced, and on July 4, 1836, ground was first broken for the canal.

Two general plans of construction had been estimated and recommended. One, which is described as the "deep-cut" plan, provided for a channel six feet below the water level of Lake Michigan, and contemplated the maintenance of a channel sixty feet wide at the top and forty feet at the bottom and a depth of six feet, supplied by the direct flowage of water from Lake Michigan. The cost of the canal under the deep-cut plan was estimated at more than \$10,000,000. This excess in cost over the available funds led to the consideration and adoption of the "shallow-cut" plan, which provided for a channel twelve feet above the water level of Lake Michigan, and contemplated to supply the channel with water by feeders from the Calumet or Des-plaines river. Up to the first of January, 1839, the gross expenditures on the canal derived from loans and the sale of lands and lots amounted to \$1,400,000. All of the canal, except about twenty-three miles between Dresden and Marseilles, was under contract, and the jobs let were roughly estimated at \$7,500,000. In this situation the legislature directed the commissioners to borrow \$300,000 and the Governor to make a further loan by the sale of \$4,000,000 of State bonds. These bonds were disposed of to irresponsible parties, some of whom paid a portion, others practically nothing, so that the State lost several hundred thousand dollars in the sale of these bonds.

On February 26, 1839, the General Assembly passed an act which is of special importance in this connection, since it is upon this act appellant rests its claim of title to the bed of the river at the point where the proposed dam is located. Section 1 of the act of 1839 provided that the sales of canal lands and town lots heretofore authorized by law shall be regulated as follows: Under the title of "conditions of sales" it was provided: "In all sales of lands and lots under the provisions of this act the following conditions shall be annexed and shall compose part of the contract." By condition 9 it is provided as follows: "That

no stream of water passing through the canal lands shall pass by the sale so as to deprive the State from the use of such water, if necessary to supply the canal, without charge for the same." Condition 11 is as follows: "Lands situated upon streams which have been meandered by the surveys of public lands of the United States shall be considered as bounded by the lines of those surveys and not by the stream." At the time this act was passed the State of Illinois owned the land on both sides of the Desplaines river where the dam in question is located. If the title to this land had passed out of the State under the act of 1839 there would be much force in appellant's contention that the riparian owners would only obtain title to that portion of land within the meander lines, the effect of which would be to reserve the title to the bed of the stream in all odd numbered sections bordering upon either side of the river in the State, and this, as we understand, is appellant's position.

The proposed dam is located in the south-east quarter of section 25, township 34, range 8, east of the third principal meridian, in Grundy county. Section 25 was one of the sections embraced in the government grant of 1827. Both parties concede that the title to the bed of the stream passed to the State under the government grant. The point at issue between the parties is whether such title passed out of the State when it sold said south-east quarter of section 25, or whether the grantee only took title to the meander line, as is provided by condition 11 in the act of 1839.

Returning again to the further history of the canal, we find that, owing to the panic of 1837 and the general shrinkage of values, the State was seriously embarrassed and its credit impaired. At this time \$1,000,000 of State bonds bearing six per cent interest were sold in London for eighty-five cents on the dollar. In 1841 the State defaulted in the payment of interest on her public debt and her financial embarrassment became alarming. The situation was greatly aggravated by the collapse of the State banks, in

1842. The State refused to take State bank paper for taxes, and the tax-payers did not have coin or the means of procuring it. There was a general stagnation in business and values rapidly declined. The State at that time owed \$14,000,000, on which it was unable to pay interest. Repudiation was openly advocated, and for a time "the fair name of Illinois became freely associated with dishonor." There was a crisis in the affairs of the State as well as in the affairs of the projected canal. Strange as it may seem, the Illinois and Michigan canal, in aid of which the credit of the State had been pulled down, was now confidently looked to as the only means of lifting it up. It was argued the advantages and facilities to be afforded by it would cause immigrants and wealth to pour into the State. To meet the dire situation and to insure the completion of the canal, Justin Butterfield, of Chicago, first suggested the idea of inducing the holders of canal bonds to advance the money for its completion upon the pledge of the canal, its lands and revenues to the bondholders in the nature of a first mortgage, and Gov. Ford recommended the adoption of this plan in his first message to the General Assembly. Accordingly, on February 21, 1843, the legislature passed an act authorizing the Governor to negotiate a loan of \$1,600,000 solely on the credit and pledge of the canal property, its tolls, revenues and lands, for a term of six years, bearing six per cent interest. Said act provided that the holders of canal bonds and other evidences of indebtedness of the State, for the purpose of aiding in the construction of the canal, should be first entitled to subscribe for said loan in proportion to the amount held by the several creditors. It was provided in said act that a board of canal trustees should be appointed, to be known and designated as the "Board of Trustees of Illinois and Michigan Canal," one of whom should be appointed by the Governor and the other two elected or appointed by the subscribers to the said loan. Section 10 of said act provided that for the

purpose of placing in the hands of the trustees full and ample security for the payment of said loan, and the interest thereon, and for the purpose of securing a preference in the payment of the debts held by the persons who would subscribe for the new loan, the "State does hereby irrevocably grant to the said board of trustees of the Illinois and Michigan canal the bed of the said Illinois and Michigan canal and the land over which the same passes, including its banks, margins, tow-paths, feeders, basins, right of way, locks, dams, water power, structures, stone excavated and stone material quarried, purchased, procured or collected for its construction, and all the property, right, title and interest of the State of, in and to the said canal, with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all the remaining lands and lots belonging to the said canal then or which hereafter may be given, granted or donated by the general government to the State to aid in the construction of said canal, and the buildings and erections belonging to the State thereon situated; the said board of trustees to have, hold, possess and enjoy the same as fully and absolutely, in all respects, as the State now can or hereafter could do, for the uses, purposes and trusts hereinafter mentioned." The only property excepted from this act were "all canal lands and lots heretofore sold by the board of commissioners upon which moneys are now due or may hereafter become due," which were reserved to the State. After considerable delay and difficulty the creditors of the State finally advanced \$1,600,000 on the faith of the act of 1843, and the final completion of the canal was at last an assured fact.

On June 26, 1845, Thomas Ford, as Governor of the State of Illinois, executed a deed to William H. Swift, David Leavitt and Jacob Fry, trustees of the Illinois and Michigan canal, under authority vested in him by section 21 of the act of 1843, conveying to said trustees, in the language of said act, all of the canal property which the State

then owned, including "the lands and lots remaining unsold, donated by the United States to the State of Illinois to aid in the completion of the said canal, * * * to have, hold and enjoy the said property, with the right of controlling, managing, selling and disposing of the same." There is no restriction in the act itself, or in the deed made by the Governor under it, which lends support to appellant's claim that the bed of the river was reserved to the State.

On October 22, 1860, the canal trustees sold and conveyed to Charles E. Boyer, for a consideration of \$1556, 196.61 acres of land in section 25, township 34, range 8, in Grundy county, and by *mesne* conveyances the title of said tract is now vested in appellee. The proposed dam is located wholly on this tract. Conveyance to Boyer was made by the canal trustees "under authority vested in said board by an act of the legislature of the State of Illinois of February 21, 1843, entitled 'An act to provide for the completion of the Illinois and Michigan canal and for the payment of the canal debt,'" which authority is recited in the face of the deed itself. The granting clause of said deed is as follows: "In consideration thereof and the premises, said board of trustees of the Illinois and Michigan canal has granted, bargained and sold, and by these presents do grant, bargain and sell, to the said Charles E. Boyer, the said tract of land above designated and described." The following is the *habendum* clause of the said deed: "To have and to hold the same, together with the rights, privileges, immunities and appurtenances thereunto belonging, unto the said Charles E. Boyer, his heirs and assigns forever." There are no exceptions, limitations, reservations or conditions in this deed. If the title to the bed of the stream did not pass by this deed it is because the trustees had no power to convey it.

Under the government grant of 1827 the State obtained title to all of section 25, including the bed of the river through that section. By the act of 1843, and the deed of

the Governor made thereunder, the title to all of the unsold portion of said section passed to the trustees of the Illinois and Michigan canal, and by their deed the title to the southeast quarter of said section on which the dam is located was vested in Boyer, and his title, as we have seen, now rests in the appellee. Under well established rules of law these several conveyances carried the title to the bed of the stream, in the absence of any language clearly denoting an intention of stopping at the edge of the river. (*Braxon v. Bressler*, 64 Ill. 488; *Davenport Bridge Railway Co. v. Johnson*, 188 id. 472.) There is no difference in the application of this rule between navigable water-courses and those which are not navigable. In grants upon navigable waters above tide waters the riparian owner takes title to the thread of the stream, subject to an easement in the public for the purpose of navigation, while as to the waters not navigable the title to the bed of the stream passes absolutely, free from any burdens in favor of the public. (*Washington Ice Co. v. Shortall*, 101 Ill. 46.) Where a riparian proprietor owns the land on both sides of a river, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it. (Angell on Water-courses, sec. 5.) This is the rule of the common law, which has been adopted in this State and applied by this court to the Mississippi river in *Middleton v. Pritchard*, 3 Scam. 510; to the Rock river in *Braxon v. Bressler*, *supra*; to the Chicago river in *City of Chicago v. McGinn*, 51 Ill. 266; to the Calumet river in *Washington Ice Co. v. Shortall*, *supra*; and to the Desplaines river in *Board of Trustees v. Haven*, 5 Gilm. 548, and *Druley v. Adam*, 102 Ill. 177. The general rule is, that when riparian estates are conveyed the owner may reserve the land under water; but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters. (Gould on Waters, sec. 195, and cases there cited.) There is nothing in any of the conveyances concerning the

south-east quarter of section 25 to indicate an intention to reserve that portion of said land in the bed of the Desplaines river. On the contrary, the language of the act of 1843, and the deed of the Governor made in pursuance thereof, is so broad and comprehensive as to preclude the State from asserting title to the bed of this stream. Anything found in the act of 1839 manifesting an intention of the State at that time to limit sales of canal lands within the meander lines of the Desplaines river must be held inconsistent with the comprehensive language of the act of 1843 and superseded thereby. We do not, however, mean to be understood as holding that the act of 1839 was superseded in its entirety by the act of 1843, but we do hold that as to sales made under the act of 1843 to procure money with which to pay debts created thereunder, such sales were not affected by the limitations in the act of 1839. After the trust created by the act of 1843 was executed and the debts for which the canal properties were pledged under that act were paid and the canal properties turned back to the State in accordance with section 9 of the act of 1843, any subsequent sales of canal lands would not be controlled by the act of 1843. The record shows that at the time the lands on which the dam in question is located were sold the debt was not fully paid, and the deed executed by the canal trustees shows by its recitals that it was made under the power conferred by the act of 1843. Deeds made by the canal trustees under the act of 1843 to lands bordering on the Desplaines river conveyed the title to the purchaser to the thread of the stream.

Appellant also contends that since the undisputed evidence shows that the Desplaines river was meandered by the government surveyors, such meander line is the boundary of riparian proprietors. A meander line is not a boundary line, but is designed to point out the sinuosities of the bank or shore and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

(*Whitaker v. McBride*, 197 U. S. 510; *Albany Railroad Bridge Co. v. People*, 197 Ill. 199.) An exception to this general rule seems to be recognized where the meander line is run and monuments are erected, but in the case at bar the evidence fails to show that any monuments were erected on the meander line, hence this case falls within the general rule and not within the exception. The State of Illinois is not the owner of the bed of the Desplaines river at the place where the proposed dam is located.

THE NAVIGABILITY OF THE DESPLAINES RIVER.—The question which has received the most exhaustive treatment by counsel relates to the navigability of the Desplaines river. The evidence introduced upon this question fills more than one thousand printed pages in the abstract, and to its discussion counsel have devoted several hundred pages of their briefs. If the dismissal of the bill by the court below had been without prejudice to the right of the State to renew its application for an injunction, such action on the part of the court below might be sustained because of the utter failure of appellant to prove that the construction of the proposed dam will be an obstruction to the present navigation of the river. There is no proof that the river is now being used as a public highway for commerce. On the contrary, the evidence not only shows that the river is not being so used, but it shows affirmatively that, owing to the presence of numerous other dams and some fifty or more bridges which span the river, it would be impossible, under existing conditions, to navigate the same. There being at present no navigation whatever upon the river, obviously the dam in question cannot be said to be an obstruction to navigation that has no existence in fact. But the decree of the court below dismissed the bill for want of equity, without reserving any right to the State to renew this application for relief on the ground that the dam in question was being erected in a navigable stream, and rendered a final decree based on the finding that the river is not navigable,

settling this question not only for the present but for all time to come, so far, at least, as the parties bound by this decree are concerned. We regard the question, therefore, as properly presented for our consideration on its merits.

The Desplaines river has its source in the south-eastern part of Wisconsin, and flows in a southerly direction, almost parallel with the western shore of Lake Michigan, through the counties of Lake and Cook, in this State, until it reaches a point nearly opposite the western end of Forty-seventh street, in the city of Chicago, where the river curves and takes a south-westerly course, passing the cities of Lockport and Joliet, and thence to a point in Grundy county, where it unites with the Kankakee river, thus forming the Illinois river. The entire length of the river is something over one hundred miles, but in determining the question of its navigability we will have no occasion to consider that portion of the river above Riverside, since it is not contended that that portion of the river is or ever has been navigable. The maintenance of the charge in the bill that the river is a navigable stream does not impose on appellant the burden of showing that the stream was navigable in its entirety, (*Schulte v. Warren*, 218 Ill. 108,) or that the navigable portion of such stream was open for use all the year round. (*Pierpont v. Lovelace*, 72 N. Y. 211; *Burke Co. v. Catawba Lumber Co.* 116 N. C. 731.) Appellant contends, and appellee seems to concede, that if it is established that the Desplaines river is navigable from Lockport to its mouth the decree of the circuit court should be reversed, even though the court might be of the opinion that the river was not navigable at any other place. We have no doubt of the correctness of this proposition as an abstract statement of the law. We will therefore confine our consideration of this question primarily to that stretch of the river, about nineteen and one-half miles in length, extending from Lockport to the mouth of the river.

The evidence shows that there is quite a fall in certain portions of the river between these two points. From Lockport to Joliet there is a fall of thirty feet in a distance of four and one-half miles, and from dam No. 1 in Joliet to the head of Patterson's island there is a fall of twenty-one feet in three and one-half miles. Then there is a stretch of about five miles, known as Lake Joliet, in which there is practically no fall. Below the foot of Lake Joliet the river divides and forms what is called Treat's island. Going down the river the main channel is on the left of the island, and there is a fall of nine and one-half feet in one mile. After passing Treat's island the river is again united and forms a pool or lake about one mile long in which there is very little fall. Going down the river the next stretch, at a point called Smith's bridge there is a fall of about two and seven-tenths feet in one mile. Passing the rapids at Smith's bridge another pool is encountered, called Lake DuPage, where there is a fall of two feet in three and one-half miles. In the last half mile above the mouth of the river there is a fall of three and one-half feet. It is across the lower end of this stretch that the proposed dam is located. The bottom of the river from Lockport to the dam in question, with the exception of that portion under Lake Joliet, is covered with a large number of bowlders. The bottom of Lake Joliet is soft. The evidence shows that these bowlders are of various sizes, some of them between two and three feet in diameter. Some of them are covered entirely with water, while others project slightly above the surface of the water. It is also shown that in going down the river in a skiff or any kind of boat there is great danger of coming in contact with these bowlders. The current is so strong that it is not possible to row a boat up stream over these rapids. In addition to the natural barriers already spoken of, the evidence shows that the stream is tortuous and the channel very narrow at places. The slopes in the river already given do not represent the greatest fall

that can be found in this stretch. The evidence shows that there is near the head of Treat's island a fall of seventeen feet to the mile, and near the foot the slope is eighteen feet to the mile, and in the right-hand channel opposite Treat's island there is a space of five hundred feet in which the fall is fifty feet to the mile, and if shorter distances are taken even greater slopes than these will be found to exist. At one place near the mouth of the river there is a fall for three or four hundred feet of twenty feet to the mile. Between the mouth of the river and Lockport there are thirteen bridges across the river, none of which have draws to permit the passage of boats, if such passage were otherwise possible. Two of these bridges are railroad bridges, and all of them are permanent steel structures. Above Lockport there are some forty other bridges across the stream, constructed for steam or electric railroads and for wagons. The width of the river varies greatly. At some places it is not more than sixty feet wide, while in the widest place in Lake Joliet it is over one thousand feet wide. The evidence shows that the depth of water in the river varies considerably in different places and also at different times in the same places. A chart showing the gauge readings at Riverside, a point twenty-eight miles above Joliet, shows the number of days in each year during which the river was dry at this point, which indicates that there were from twenty-four days in 1890 to two hundred and thirteen days in 1895 during which the river was dry at this point. This chart also shows the number of days during each of these years when there was a discharge of less than six inches of water at Riverside, the result of which is, totaling the number of dry days and the days showing less than a six-inch discharge, that there were from one hundred and twenty days in 1888 to three hundred days in 1901 when the river was either dry or showed less than six inches of water at Riverside. The depth of the river during the balance of the year is not shown on this chart. These gauge readings

also show that the dry or low periods did not occur during the same time in each year. Every month in the year is represented several times during the years covered by this chart, from which the conclusion is drawn that there were no regular periods when a given stage of water could be safely expected.

We refer to the readings on the Riverside gauge, not because of their bearing on the question of navigability at that point, but for the reason that they tend to show the natural volume of water in the channel above the points where the volume is increased by the additions made by the Illinois and Michigan canal and the drainage channel, which added from 250,000 to 400,000 cubic feet of water per minute to the river below the point of connection.

Appellant strongly contends that the rights of appellee as riparian owner are to be determined with reference to the conditions that exist since the deepening of the Illinois and Michigan canal and the construction of the sanitary district channel, by means of which the volume of water in the Desplaines river has been greatly increased. It is argued that the navigability of the river is to be determined with reference to the changed condition and not as the stream existed in a state of nature. Appellant's position, as we understand it, is this: Assuming the stream to be unnavigable in its natural condition, the State may by artificial means so change the stream as to make it navigable and thus destroy the vested property rights of riparian owners upon the said stream. This position is untenable. The property rights of riparian owners in the bed of an unnavigable stream are as sacred as any other property right, and such owners cannot be deprived of those rights, without compensation, by artificial additions to the waters of the stream whereby it is rendered navigable. To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable, and thereby deprive riparian owners of their property rights in the bed of the

stream, is simply to hold that private property may be taken or damaged for public use without compensation.

The contention of appellant upon this question is contrary to the authorities. In *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 36, the court, speaking by Judge Cooley, upon this question said: "No such inference is warranted by the decisions. The highway they recognized is one *sui generis* and in which the public rights spring from peculiar facts. It is a public highway by nature, but one which is such only periodically and while the natural condition permits of a public use. * * * But at periods when there is no highway at all there is no ground for asserting a right to create a highway by means which appropriate or destroy private rights. The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of constitutional rights. The most that can be said of this stream during the seasons of low water is, that it is capable of being made occasionally navigable by appropriating for the purpose the water to the natural flow of which the riparian proprietors are entitled. It is highly probable, in view of the large interests which are concerned in the floatage, that the general public good would be subserved by so doing, but this fact can have no bearing upon the legal question. It is often the case that the public good would be subserved by forcing a public way through private possessions, but it neither should be nor can be done, under any circumstances, without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public."

In *Druley v. Adam*, *supra*, this court, in speaking of the added volume of water to which the proprietors of the Haven dam were entitled by reason of the deep cut in the Illinois and Michigan canal, said (p. 206): "It may be quite true that appellee has now more water than he had

before the deepening of the Summit level, and that contrasting his condition now with his condition then he is not injured, but he is entitled, by virtue of his position as lower proprietor, as has been shown, to the benefit of all improvements whereby the flow of the water in the river is increased, and this property right cannot be taken from him without his consent. The right which the lower riparian proprietor has to avail himself of all benefits resulting from improvements by upper riparian proprietors is obviously a property right growing out of the nature and necessities of flowing water and his position upon the stream, and of which, therefore, he can no more be deprived, without his consent, than of any other property right."

The rule that the navigability of the stream is to be determined with reference to its natural condition is supported by numerous other authorities: *Hall v. Lacy*, 3 Grant's Cas. 264; *Carter v. Thurston*, 58 N. H. 104; *Lewis v. Coffee County*, 77 Ala. 190; *Stratton v. Currier*, 81 Me. 497; *United States v. Rio Grande Dam and Irrigation Co.* 174 U. S. 690; *In re Ball*, 10 Wall. 557; *In re Montello*, 20 id. 431.

We are aware that there is a line of cases which at first blush may appear to be in conflict with the rule laid down in the authorities above cited. While the rule is well founded, both upon reason and authority, that a stream not navigable in its natural condition cannot be made so by artificial means, so as to deprive riparian owners of vested rights without compensation, it is equally well established that a stream which is, in fact, navigable in its natural state may be improved for the purpose of enlarging its usefulness, and the public will have a right to the enjoyment of the easement in its enlarged condition. It is to this principle that the cases of *Schulte v. Warren*, *supra*, and *Mendota Club v. Anderson*, 101 Wis. 479, and other like cases relied on by appellant, are to be referred. There is nothing in this line of decisions that is in conflict with the rule stated

above or the authorities cited in support thereof. In view of the constitutional inhibition against the taking or damaging of private property for public use without compensation, the rule must, of necessity, be that the State cannot directly by its own act or indirectly through the act of any of its agents change an unnavigable stream to one that is navigable, and thereby destroy or damage the private property rights of adjacent owners, without making compensation. The State can no more establish a waterway over private property without compensating the owners than it can build a railroad or a public highway over farm lands without paying for the right of way and all damages to property not taken. The same constitutional provision that protects property rights in real estate above the water line of an unnavigable stream extends to and protects that which is below the water, guaranteeing the same full measure of enjoyment to the owner in the one case as well as in the other. This view is supported by the decision of this court in *City of Chicago v. Laughlin*, 49 Ill. 172, where, on page 177 of the opinion, the following language is used: "It would be monstrous that the city should, at pleasure, make changes in this stream so as to render buildings on the wharves an obstruction and then require their removal without compensation. Such power would be more vast and absolute than can be exercised by the State itself. The city government is created and has its powers delegated for the better protection of individual rights, and not that they may be disregarded or destroyed."

The widening or deepening of navigable streams, or the improvement of those which are not navigable so that they may become so, or the construction or improvement of harbors, are works of a public nature, conferring benefits on the public at large. Such improvements may be made and paid for out of the general treasury, from funds raised by taxation. The Supreme Court of the United States, in *County of Mobile v. Kimball*, 102 U. S. 691, decided that

the State might authorize a county to improve a public harbor, to be paid for by bonds which were ultimately to be paid by general taxation upon property of the county. (See Page & Jones on Taxation by Assessment, sec. 360.) But under the law of this State as laid down in *City of Chicago v. Law*, 144 Ill. 569, a navigable stream cannot be improved and the cost thereof levied by a special assessment upon the real estate fronting upon such water-course. In that case an attempt was made by the city of Chicago to improve the south branch of the Chicago river and to charge the cost of such improvement by a special assessment against the lands and lots fronting on the same, and this court, in denying the power of the State to make such improvement by a special assessment, on pages 576 and 577, said: "The river is a navigable stream of the United States. It connects with Lake Michigan, and by means of the lake with the country at large. The Federal government has assumed jurisdiction over it, and expended money, as appears from the admitted facts, for its improvement. It is one of the channels over which the commerce of the country passes, and this improvement was instituted for the purpose of increasing its power as one of the navigable streams of the country. It was undertaken in the interest of the commerce of the country. Was it ever intended that a few land owners bordering on one of the navigable streams of the country should be compelled to pay for an entire improvement in a river, the object of which is to benefit the public at large rather than the locality where the improvement is made? Here the contemplated improvement was one to widen the river in order that boats and vessels might pass up and down the river with greater facility,—one calculated to increase the navigable qualities of the river,—an enterprise wholly public in its nature. If one of the cities located on the banks of the Mississippi river should undertake to remove obstructions from that navigable stream of water to enable boats to run up and down the river with greater

facility and pay for the improvement by special assessment on property fronting on the river, it would not, we apprehend, be contended that an assessment of that character could be sustained under the provisions of the statute above cited; and yet there is no substantial difference between the supposed case and the one under consideration. The proposed improvement has none of the elements of a local improvement, such as incorporated towns and cities have been in the habit of making by special assessment."

If riparian owners cannot be specially assessed to pay for the improvement of a navigable stream, *a fortiori* they cannot be required to surrender valuable property rights, without compensation, in furtherance of a scheme to improve one that is not navigable in its natural condition. Much time and labor have been spent by appellant in presenting reports of surveys, maps and engineering schemes for the improvement of this river, which, if carried out, would render the river navigable. But all this is not pertinent to the issue. The question is whether the river was navigable in a state of nature, and not whether it can be made so by artificial means.

It is also contended that the Sanitary District act declared this river to be navigable. This contention is based on a sentence in section 24 of said act, as follows: "When such channel shall be completed, and the water turned therein, to the amount of 300,000 cubic feet of water per minute, the *same* is hereby declared a navigable stream." Appellant's contention, under this statute, is thus stated in its brief: "The *same* means that the water flowing in that channel is a navigable stream. The water so turned in was navigable in fact, and it does not lose its navigability in passing out of the artificial channel into the channel of the Desplaines river. The water is just as navigable one-half mile south-west of Joliet as it is one-half mile north-east of Joliet." The argument is based upon an erroneous con-

struction of the word "same." That term refers to the channel of the sanitary district and has no reference to the water after it leaves the channel.

But even if the legislature had declared, in unequivocal language, that the Desplaines river was navigable, as it did by the act of 1907, such declaration could not have the effect of depriving appellee of vested rights as riparian proprietor, if such rights exist. The general doctrine upon this question is well expressed by the Supreme Court of Kentucky in *Murray v. Preston*, 106 Ky. 561, (90 Am. St. Rep. 232,) as follows: "The first question is, what is the effect of the act of the legislature declaring this creek a navigable stream? The constitution of the State forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed it was the private property of the owners of the adjoining lands. If it was the private property of appellant within the boundary of his land, the legislature could not divest him of his rights by simply calling it a navigable stream when it was not one in fact. The rule on this subject is thus stated in *Cooley on Constitutional Limitations* (side p. 591): "The question what is a navigable stream would seem to be a mixed question of law and fact, and though it is said that the legislature of the State may determine whether a stream shall be considered a public highway or not, yet if, in fact, it is not one the legislature cannot make it so by simple declaration, since if it is private property the legislature cannot appropriate it to a public use without providing for compensation.' " And the same doctrine is announced in the following cases: *Walker v. Board of Public Works*, 16 Ohio, 540; *Morgan v. King*, 35 N. Y. 454; *Shenango Bridge Co. v. Paige*, 83 id. 178; *Martin v. People*, 5 Blackb. 35; *Olive v. State*, 86 Ala. 88; *People v. River Mill and Lumber Co.* 107 Cal. 221; *Yates v. Milwaukee*, 10 Wall. 497; *Watkins v. Dorris*, 54 L. R. A. 199.

None of the legislative acts relied upon by the appellant were passed for the primary purpose of promoting deep water navigation from the lakes to the gulf by means of improving the channel of the Desplaines river. The various acts passed in the interest of the Illinois and Michigan canal, as well as the Sanitary District act, did not include any general scheme for the improvement of the Desplaines river. Up to this time no general plan for the deep waterway has been adopted, either by the State or the nation. Whether such enterprise will ever be attempted by either, separately or by the joint action of both, and, if such enterprise is entered upon, whether the plan will embrace the use of the old Illinois and Michigan canal or the sanitary district channel in connection with a part of the Chicago and Desplaines rivers or whether some new and entirely different channel will be adopted, are all legislative questions, with which the courts have no concern. Figuratively speaking, the waters have been much troubled on this subject, but so far neither the nation nor the State has legislated how they shall flow. What the future will see accomplished along these lines no one can know. It may be that when that future is unfolded it will bring a realization of the hopes of the most optimistic, and that the appearance of sea-going vessels plowing through the prairies of Illinois, laden with the people and products from the uttermost parts of the earth, will be as common as the now almost forgotten "prairie schooners" of 1849 were in those days. But if this transition is to occur,—if the powerful hands of the government are to lay hold of this gigantic enterprise,—due regard must be had to the sacred rights of every citizen, however humble and insignificant those rights may seem in contrast with the great public consummation.

What is a navigable stream is a question to which different courts have given different answers. In some of the States, where the lumber business was of great importance and the floating of saw logs an essential branch thereof, a

stream that had the capacity for floating logs, though only for short periods in times of freshets, was held to be navigable. (*Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519.) But these cases, and the reasons upon which they rest, were examined by this court in *Hubbard v. Bell*, 54 Ill. 110, and their authority expressly rejected. In discussing that question this court, on page 122, used the following language: "It is not enough that a stream is capable, during a period, in the aggregate, of from two to four weeks in the year, when it is swollen by the spring and autumn freshets, of carrying down its rapid course whatever may have been thrown upon its angry waters, to be borne at random over every impediment in the shape of dams or bridges which the hand of man has erected. To call such a stream navigable in any sense is a palpable misapplication of the term." The doctrine of this case has been re-affirmed by this court in *Schulte v. Warren*, *supra*, and on page 119 of the latter case this court approved the following definition of a navigable stream by Lord Hale in his treatise *De jure maris*: "A stream, to be navigable, must furnish 'a common passage for the king's people,' must be 'of common or public use for the carriage of boats and lighters,' must be capable of bearing up and floating vessels for the transportation of property conducted by the agency of man." And the same definition is also approved in *Joliet and Chicago Railroad Co. v. Healy*, 94 Ill. 416. In the *Schulte* case it was further said (p. 119): "A stream is navigable, in fact, only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable."

A stream, to be navigable, must in its ordinary, natural condition furnish a highway over which commerce is or

may be carried on in the customary modes in which such commerce is conducted by water. (Gould on Waters, sec. 34, and cases there cited.) Whether the stream in question is navigable is a question of fact, the burden of proving which rests upon the party asserting it. (*Ligare v. Chicago, Madison and Northern Railroad Co.* 166 Ill. 249.) To maintain this issue appellant with commendable industry has assembled every fact which appears to have even a remote bearing on the question and incorporated the evidence in the record. Research into historical data has been made and the result presented to the court. This class of evidence begins with the account of the first voyage of Marquette and Joliet, in 1673-74, as related by John Gilmary Shea in "Shea's Early Voyages up and down the Mississippi," published in 1700 by Burrow Bros. Excerpts from this publication were introduced, also copies of maps made by Marquette and Joliet showing the principal features of the country explored by them. Section 10 from a chapter from this book, entitled "The first voyage made by Father Marquette toward New Mexico, and how the idea thereof was conceived," reads as follows:

"Return of the Father and of the French.—After a month's navigation, while descending the Mississippi from the 42d to the 34th degree and beyond, and after preaching the gospel as well as I could to the nations that I met, we started on the 17th day of July from the village of the Akensea to retrace our steps. We therefore re-ascended the Mississippi, which gives us much trouble in breasting its current. It is true that we leave it at about the 38th degree to enter another river, which greatly shortens our road and takes us with but little effort to the Lake of the Illinois. We have seen nothing like this river that we enter, as regards its fertility of soil, its prairie and woods, its cattle, elk, deer, wild oats, bustards, swans, parroquets, and even beaver. There are many small lakes and rivers. That on which we sailed is wide, deep and still for sixty-five leagues.

In the spring and during part of the summer there is only one portage of half a league. We found on it a village of Illinois, Kaskaskia, which consists of seventy-four cabins. They received us very well and obliged me to promise that I would return and instruct them. One of the chiefs of this nation, with his young men, escorted us to the Lake of the Illinois, whence at last, at the end, we reached the bay Des Prantz, from which we had started at the beginning of June."

This account indicates a reasonable probability that Father Marquette went up the Mississippi river, turned into the Illinois, thence up the Illinois to the mouth of the Desplaines, and up that river to a point where a portage was made to the south branch of the Chicago river, thence into the Lake of Illinois, (Lake Michigan,) and this probability is strengthened by the maps introduced, which show that these rivers, together with the portage between the Desplaines and the Chicago, were known at that time. The boats in which these voyages were made are described in the following passage: "We were not long in preparing all our equipment, although we were about to begin a voyage the duration of which we could not foresee. Indian corn, with some smoked meat, constituted all our provisions. With these we embarked,—Monsieur Jolliet and myself, with five men,—in two bark canoes, fully resolved to do and suffer everything for so glorious an undertaking."

A passage from "Indian Antiquities," by Schoolcraft, is introduced, which recites that in 1783 Jean Baptiste Perreault, a fur trader from Montreal, spent a year in Cahokia and returned by way of Chicago with a canoe and a barge loaded with furs. The passage referred to is as follows: "About the 15th of April the packs from Missouri arrived. Our bourgeois settled his accounts with M. Coteau and received seventy-four packs of furs. His retail store at Cahokia produced 500 Spanish dollars and 400 pounds of tobacco. We left Cahokia on the 4th of May for Macki-

nac. My directions were to pass by Chicago, having one barge and one canoe, and to await the arrival of M. Marchisseaux at Little Detroit, in Lake Michigan, he having gone by the way of Prairie des Chiens to terminate his business with the Sauks. After fourteen days' detention he arrived, and continuing our route we reached Mackinac the beginning of July, where I found myself at liberty."

A manuscript not very well authenticated was introduced, which shows that Hugh Heward, in May, 1790, made a voyage from Lake Michigan through the Chicago river and over the portage road to the Desplaines, and down the Desplaines and Illinois to some point (probably Kaskaskia) on the Mississippi river. This document records the fact that after passing over the rapids above the village of Mt. Julliette two of his comrades informed Heward that "there was so much danger they would not return with Heward." The character of the boats and cargo is not described, but neither could have been very heavy, since the boats and cargo were carried over the portage from the Chicago river to the Desplaines by Heward and his two comrades with the help of five Indians, whose services were paid for with two handfuls of powder.

There are other historical references to the route by way of the Chicago and Desplaines rivers to the Mississippi, but these are the only well authenticated voyages that were made during the first one hundred and fifty years after the discovery of the Desplaines river. The fact that during this long period only an occasional voyage was made under the guidance of a heroic adventurer or a religious zealot, who, in the language of Marquette, "feared no death and regarded no happiness greater than that of losing his life for the glory of Him who made us all," is not sufficient evidence to prove that the Desplaines river was, in fact, regarded as navigable by the great majority of the people who must have been acquainted with it during this period. It rather tends to show that the few who possessed

the courage to brave the dangers incident to a voyage over the rocky rapids of the Desplaines were exceptional cases, and that the great body of the people living in the vicinity of this river did not regard the navigation of the river as reasonably safe and therefore made no use of it. There is not in this entire record a well authenticated instance in which a boat engaged in commerce navigated the waters of the Desplaines river. It seems pertinent to inquire, if the Desplaines river is navigable why has it not been navigated? If the Desplaines river was navigable, why did the State of Illinois spend \$10,000,000 in the construction of the Illinois and Michigan canal, which parallels the Desplaines river? The conclusion is irresistible that in the opinion of the legislature the Desplaines river was not only not navigable in its natural condition, but that the natural obstructions were such that it was cheaper to construct a navigable canal than to remove the difficulties out of the natural channel. Appellant's answer to the last question above stated is, that the Illinois and Michigan canal was extended beyond the point where it might have intersected the Desplaines river in order to obtain as large a grant of land as possible from the Federal government. This answer discredits the intelligence of Congress and reflects on the honor of the State. We are unwilling to believe that the State would have asked for, or that Congress would have granted, lands to aid in the building of a canal that was not needed. The Chicago river was used as a part of the canal at its northern end, and had it been practicable to do so, it is reasonable to believe the Desplaines river would have been used at the other end.

A large number of witnesses testified, some from personal observation and others as experts, upon this issue. As might be expected, these witnesses testify to opposite opinions in regard to the navigability of this river. It is not practicable nor desirable to discuss this evidence in detail. Whatever may be thought of the preponderance of it

one way or the other, it can have but little weight as against the uncontroverted fact that the river has never been used as a public highway for commerce. During the early part of the history of the Mississippi valley, and before railroad transportation came into general use, all of the navigable rivers in the settled portion of the country were extensively used. The necessities of the early settlers compelled them to use the means of transportation that nature afforded them. Before steamboats were in general use, farm products were floated down the Mississippi river and all of its tributaries in flatboats. The Sangamon, Illinois, Wabash and Ohio rivers were thus extensively used. Had it been possible to do so, it seems but reasonable that the Desplaines river would have been used in the same way by the early settlers, but the evidence of any such use is not found in this record. The evidence shows that as early as 1817 there was a well-beaten wagon road from the mouth of the Desplaines river to Chicago, over which boats and other loads were hauled by oxen and vehicles kept for that purpose by the French settlers at Chicago. The evidence of the existence of this road is found in a report by R. Graham and Joseph Phillips made to Hon. J. C. Calhoun, Secretary of War, and is dated "Kaskaskia, April 4, 1819." The testimony of the early settlers is, that they came in and went out of Chicago by wagon road. In 1836 the New York and Oswego Transportation Line advertised in the *Chicago American* of May 14, 1836, that goods would be transported from New York to St. Louis. One link in the line of transportation was by "wagons from Chicago to the head of navigation on the Illinois river." And in the same paper a passenger line was advertised from Chicago to Peoria, which was by a mail stage leaving Chicago daily for Peoria, making the trip of 170 miles in "from thirty to thirty-five hours by steamboats and stages,—stages from Chicago to Peru and steamboats from Peru to Peoria. Fare, the whole distance, \$11, and found on board the

boat. This line passes through Lockport, Juliet, Ottawa and Utica, to Peru." All of the witnesses who testified to the mode of transportation before the opening of the Illinois and Michigan canal, in 1848, testify to the general custom that prevailed along the line of the Desplaines river of hauling grain and other produce by wagon to Chicago, and some of them say that it was not uncommon in those days for wagons to go to Chicago from points as far south as Bloomington.

Appellant has introduced, for the purpose of comparison, descriptions of other rivers which have the same or similar natural obstructions that are found in the Desplaines river, notwithstanding which such other rivers have been held to be navigable. Evidence of this character was introduced in regard to the Mississippi, Fox, Wisconsin, Ohio, Kanawha, Cumberland, Missouri, Gasconade, Allegheny, Tennessee, Sangamon, Columbia and Snake rivers. To review all this evidence would extend this discussion to unreasonable bounds. We are not strongly impressed with the line of reasoning that is based upon this class of evidence. There are no two rivers exactly alike, and it will be found that most, if not all, of the rivers referred to as standards of comparison contain a long strip of navigable water, which is of sufficient length and importance to justify commerce in devising methods to overcome the natural obstructions. This is not true of the Desplaines river. There are no navigable portions of this river of sufficient length to make navigation profitable thereon. After the most careful consideration of this question we are of the opinion that the Desplaines river in its natural condition is not a navigable stream, and that the rights of parties to this suit must be determined upon that basis.

THE VALIDITY OF THE CONTRACTS.—*The flowage contract.*—The third ground upon which appellant rests its right to an injunction is the alleged invalidity of certain contracts entered into between the commissioners of the Illi-

nois and Michigan canal and certain parties who have transferred all their interest in said contracts to appellee. In order to properly understand the questions involved in regard to these contracts it will be necessary to state some facts which we have not heretofore referred to.

At the point where the dam is located the Illinois and Michigan canal parallels the Desplaines river. The two water-courses are separated at this point by an artificial embankment erected by the State in the construction of the canal. The canal is on the right side of the river, and still to the west of the canal arise steep bluffs, which are known as "Dresden Heights." On the left side of the river the triangle of land between it and the Kankakee is low and flat. The canal is elevated by means of an artificial embankment. This embankment has a trench in the top, carrying the Illinois and Michigan canal. The left-hand side of the embankment slopes toward the Desplaines river. On this side of the canal there is a level space a few feet wide at the crest of the embankment, which is called the tow-path. The sloping embankment of the canal extends up the canal. Appellee's purpose is to construct a dam across the Desplaines river so that the right-hand end thereof will rest against the sloping side of the canal embankment, thus forming a pool of water above the dam which will at its extreme height be twenty-four feet above low-water mark in the Desplaines river at the dam. The pool of water thus formed will extend several miles up the river, one side of which will rest against the canal embankment. At the point where the dam is located the canal embankment is approximately twenty-four feet above the level of the water in the river. The base of the canal at this point is about seventy feet in width, and the left bank next to the river is from twelve to fourteen feet in width at the top. From the base of the canal the ground slopes gradually to the river, which is about seven hundred feet distant. Appellee's intention is to raise the water in ordinary stages to an

elevation about seven feet lower than the top of the tow-path bank. About one-half mile up the river from the dam is the southern extremity of a narrow strip of land between the canal bank and the river, which is designated in the record as the "sixteen-acre tract." This sixteen-acre tract is low and marshy, and is bounded on the one side by the Desplaines river and by the canal on the other. It is in section 31, township 34, north, range 9, east of the third principal meridian, in Will county, and is a part of the lands granted by Congress to the State to aid in the building of the canal and still belonged to the State when the flowage contract was made. The effect of constructing this dam will be to flood this sixteen-acre tract.

Appellant contends that the contract executed September 2, 1904, by the canal commissioners to Harold T. Griswold, designated in the record as "the flowage contract," is void and should be so declared by the court. This contract recites, that whereas the said Griswold, party of the second part, claims to be a riparian owner along the Desplaines and Illinois rivers, in Grundy and Will counties, and is, as such riparian owner, about to improve the Desplaines river by the construction of a dam and other works across the mouth of said river, with a crest of such height that the pool formed thereby will be on a level with the waters of Lake Joliet, and is about to improve the Illinois river by deepening the channel of said river in section 25, township 34, north, range 8, east; and whereas, the State of Illinois is a riparian owner at different points on the Desplaines and Illinois rivers within the territory covered by this contract, and is the owner of certain described parcels of land under the control of the canal commissioners and which are not connected with a water power upon the Illinois and Michigan canal, which said riparian rights of the State have never produced a revenue, and the land is swampy, partially covered with water, and said lands are so situated that they cannot be made available by the State

to create water power, and the party of the second part is desirous of obtaining the right to use, overflow and damage (not, however, in a manner to interfere with navigation on the Illinois and Michigan canal,) so much of the property of the State as may be necessary in the construction of said dam and other works in the improvement of said Desplaines river and in the deepening of the channel of the Illinois river, therefore, in consideration of these premises and the sum of \$2200, the receipt of which was acknowledged, the parties entered into a contract, the substance of which is as follows:

The said contract purports to give the consent of the commissioners of the Illinois and Michigan canal to the construction of a dam across the mouth of the Desplaines river, with a crest at an elevation not to exceed minus 73.2 Chicago datum, which dam shall not back the water beyond the northern limits of Lake Joliet, and to deepen the channel of the Illinois river at certain points; and gives the right and authority to Griswold to flow the ninety-foot reserve strip through certain sections of land by the canal bank, and to flow such of the lands in the north fraction of section 31, township 34, as lie south of the ninety-foot strip along the tow-path side of the Illinois and Michigan canal, where the same may be overflowed by reason of the construction of said dam, together with a right to flow the water up against the tow-path bank of the canal, subject to certain conditions and specifications therein provided, intended to protect and preserve the canal and the tow-path bank thereof. The contract authorizes Griswold to attach one end of the dam to the tow-path bank of the canal, but not so as to interfere in any manner with the use of said tow-path in connection with said canal. The contract also authorizes Griswold to excavate in and remove so much of the Kankakee feeder (an abandoned feeder of the Illinois and Michigan canal) as may be necessary to discharge the waters of the Desplaines river through said

feeder in a proper manner, and to remove the old aqueduct piers belonging to said feeder in the Desplaines river. The contract further provides that Griswold shall have the right to turn and avert water from the Desplaines river into the Kankakee river through a certain stream of water called the "Kankakee cut-off," through and over the Kankakee feeder and the ninety-foot strip on each side of the feeder, in section 25, township 33, range 9, and to construct controlling gates on the banks of said feeder for flood protection from the Kankakee river. Clause 6 of said agreement is as follows: "It shall be the duty of said party of the second part, subject to the direction of the canal commissioners or other officer or agent, as hereinafter indicated, to raise the tow-path or bank of the Illinois and Michigan canal from its present height not less than two feet, and to any additional height that may be necessary to prevent overflow, and to *perpetually* thereafter maintain the same in good condition. The raising of said tow-path shall extend from the point in said Grundy county where the dam or other structure of said party of the second part intercepts said tow-path bank to lock No. 7, in section 17, township 34, north, range 9, east of the third principal meridian, and when raised, the width of the top of the tow-path bank shall conform to the width of the tow-path as it exists at the present time." By the eighth clause of said contract permission is given to Griswold to use so much of the gravel or other material lying along the canal and belonging thereto as may be necessary to raise the tow-path bank as is provided in the sixth clause, such material, however, to be taken from places indicated or approved by the superintendent of the canal. Permission is given to enter upon the lands and premises of the State for the purpose of constructing said dam and raising the tow-path and for making necessary repairs to the same. Griswold covenants to raise certain buildings owned by the State and used in connection with the canal to a level with the tow-path, as pro-

vided in paragraph 6 of said contract, and to provide two acres of land to be used by the State as a garden in connection with said buildings. It is provided and stipulated that all of the work to be done under said contract which shall affect the canal property or interest shall be done under the supervision of and to the satisfaction of the canal commissioners or other duly authorized agents, and not otherwise, and that such work, when completed, shall at all times be kept and maintained by said Griswold under a like supervision and approval of the canal commissioners, and that all costs of inspection shall be borne by said Griswold, who is, under the terms of said agreement, to be held responsible for all damages that may be sustained by the State or the canal commissioners, or the persons or property of persons using the Illinois and Michigan canal, or that may be occasioned by the construction of the works contemplated to be done or in the subsequent repair and maintenance thereof under said contract. Said contract, and all the provisions thereof, are by its terms made obligatory upon the successors and assigns of said Griswold.

The Kankakee feeder is an artificial channel which was constructed upon the right side of the Kankakee river, commencing a few miles above the confluence of the Kankakee and Desplaines rivers and running in a north-westerly direction, almost parallel with the Kankakee river, to a point where the feeder intersects the Desplaines river, a distance of some three-quarters of a mile above the mouth of the Desplaines. The purpose of this feeder was to supply water to the Illinois and Michigan canal prior to the lowering of its summit level, after which the canal was supplied with water from Lake Michigan. The Illinois and Michigan canal being on the opposite side of the Desplaines river from the Kankakee feeder, it was necessary to cross the Desplaines river with this feeder in order to deliver the water into the canal. The aqueduct and piers referred to in the flowage contract, and which Griswold is given the

right to excavate and remove, are the works that were placed in the Desplaines river for the purpose of carrying the water in the Kankakee feeder across the Desplaines river to the canal. As already stated, this feeder was rendered unnecessary after the summit level of the canal was lowered by the city of Chicago, so that the so-called Kankakee feeder has not been used for nearly twenty years prior to the commencement of this suit. It is marked "abandoned" on the map made under the direction of J. W. Woermann, United States assistant engineer. The evidence shows that the Santa Fe and Chicago and Alton railroads cross the Kankakee feeder and the ninety-foot reserve strip on either side thereof, and that the channel is filled up by the railroad embankments at the point where they cross the feeder. The Kankakee cut-off is an artificial channel connecting the Kankakee and Desplaines rivers. It taps the Kankakee river at a point near the section line between sections 5 and 6, township 33, north, range 9, east, and extends north a distance of two miles and intersects the Desplaines river about two miles above its mouth. The Kankakee cut-off crosses the Kankakee feeder near the center of the south line of section 5.

Appellant's contention in reference to this flowage contract is, that it is, in effect, a sale of the interest in the lands affected thereby, and as such it is void under the statute hereinafter referred to, because it was not made at a public offering after giving the statutory notice. It will be observed that this flowage contract is not limited to twenty years or any other specified term. The absence of such limit, and the provision in clause 6 which we have quoted above regarding the agreement of the party of the second part to perpetually maintain the tow-path or the bank of the canal in repair, form the basis for the contention that the contract is, in effect, a sale of the interest in the lands to be flooded. Numerous authorities are cited by appellant to the effect that an agreement for the perpetual flow-

age is, in effect, a sale of an interest in the land and a right of perpetual possession. Among the cases so holding in this State are *Woodward v. Seely*, 11 Ill. 157, and *Wilmington Water Power Co. v. Evans*, 166 id. 548. The authorities are numerous in other States to the same effect and the soundness of the proposition cannot be questioned.

The act of March 27, 1874, (Hurd's Stat. 1908, p. 220, *et seq.*), under which all of the contracts in question were made, after providing in sections 1 to 7 for the appointment and organization of the board of canal commissioners, by section 8 defines the powers and duties of the said board. Said section 8 reads, in part, as follows:

"Sec. 8. Said commissioners shall have control and management of the Illinois and Michigan canal, including its feeders, basins and appurtenances, and the property thereto belonging, and all locks and dams and other improvements of the navigation of the Illinois and Little Wabash rivers, and shall have authority: * * *

"*Fourth*—To sell and dispose of any machinery, fixtures, stone, debris, material or personal property unnecessary for the proper management, construction, repair or use of said canal, locks, dams, and other improvements.

"*Fifth*—To lease from time to time any of the canal lands or lots owned by the State: *Provided*, no lease shall be for a period exceeding twenty years.

"*Sixth*—To lease from time to time, to the highest bidder therefor, any water power and lands or lots connected therewith. Before any such lease shall be made, at least thirty days' public notice of the intended letting shall be given by publication in some newspaper published in the neighborhood, and such other notice as the commissioners shall deem best. The commissioners shall have power to require that bids be accompanied by security and may reject all bids not satisfactory to them, and re-advertise until they shall receive satisfactory bids. No lease shall be for a period exceeding twenty years, but the commission-

ers may provide for the extension of any lease from time to time, not exceeding twenty years at any one time, at a rent to be fixed by an appraisal, to be made by three disinterested appraisers to be appointed by the Governor, and such appraisal shall be subject to the approval of the commissioners. All leases of water power and extension thereof shall be subject to the right of the commissioners to resume, without compensation to the lessee, the use of any such water power for the purpose of the canal, and also wholly to abandon or destroy the work by the construction of which the water privilege shall have been created, whenever, in the opinion of the legislature, such work shall cease to be advantageous to the State.

*"Seventh—*To lease from time to time to the highest and best bidder (after publishing notice in some newspaper published in the county where the ice privilege to be leased may be,) in sections not exceeding one thousand feet, lineal measure, upon such terms, as not to interfere with the proper use and management of the canal, the right to take and harvest ice therefrom, or from any of its feeders, basins and appurtenances, and to prohibit all persons from taking and harvesting ice therefrom without such lease: *Provided*, no such lease shall be for a longer time than twenty years.

*"Eighth—*To sell and convey, whenever in their judgment the interest of the State will be promoted thereby, any canal lands or lots now owned by the State, and any riparian rights in and along the Desplaines river: *Provided*, they shall not sell any lands or any portion of the ninety-foot strip along the canal which are now utilized in connection with the use of the water power upon the said canal or which will prevent or interfere with the proper use and operation of the said canal as a waterway. But before making any such sale they shall obtain the approval of the Governor thereto, and to the time, place and manner of

making the same: *Provided*, that before any such sale shall be made thirty days' previous notice thereof shall be given in some newspaper published in the county where such land, lots or riparian rights are situated. And said land, lots or riparian rights shall be sold at public auction to the highest and best bidder: *Provided*, that any or all such bids may be rejected if, in the judgment of the canal commissioners the interests of the State seem to require it.

*"Ninth—*To execute in due form and deliver any conveyance that may be necessary to comply with the conditions of any bond, contract or agreement heretofore made by those lawfully authorized to sell any of the real estate known as canal lands, where the purchaser shall have complied with the conditions of such bond, contract or agreement, and the commissioners are satisfied that he is justly entitled to such conveyance."

It will be seen that under the second proviso of clause 8 of section 8 of the statute above quoted it is required that before any sale of "canal lands or lots" can be made by the canal commissioners it is necessary that they obtain the approval of the Governor and advertise such sale for thirty days in some newspaper published in the county where such lands, lots or riparian rights are situated, and that such sale can only be made at public auction to the highest and best bidder. If the flowage contract was a sale of canal lands or lots or riparian rights, then, clearly, under this statute such sale would be void, since there was no attempt on the part of the canal commissioners to comply with clause 8 in relation to the sale of canal lands and lots. By careful attention to section 8 and the several clauses thereof it will be found that the powers of the canal commissioners may be divided into two classes, as follows:

(1) Powers which may be exercised without notice, which are: (a) All the general powers of the commissioners given by the first sentence in section 8; (b) the power

to sell and dispose of personal property, as provided in clause 4; (c) to lease for a period not exceeding twenty years any of the canal lands and lots owned by the State.

(2) Powers which can only be exercised after public notice and at public auction, which are: (a) The power to lease water power and lands and lots connected therewith, as provided in clause 6 of said section 8; (b) the power to lease the right to harvest and take ice from the canal, as is provided in clause 7; (c) the power to sell and convey canal lands and lots and riparian rights in the Des-plaines river, as provided in clause 8.

The commissioners have no power to sell any land or any portion of the ninety-foot strip along the canal which is now utilized in connection with the use of water power, either at public or private sale, with or without notice.

Appellant contends that this flowage contract was a perpetual license to flow certain lands belonging to the State, and is void because a perpetual license is, in effect, a sale of an interest in the land, and, regarding the contract as a sale, it cannot be upheld, for the reason that the statute in respect to sales was not complied with. There is no language in the contract showing that the parties to it intended it as a sale of any interest in the lands described therein. To give it the effect of a sale would be obviously against the intention of the parties to the contract.

Appellant contends that the contract is a sale because of the use of the word "perpetually" in connection with the duty of Griswold to keep the tow-path bank in repair. If this contract had by its terms granted the rights and privileges therein mentioned for a term of twenty years it would clearly be within the powers of the commissioners which are enumerated under division "c" of class 1, which are granted by the fifth clause of section 8 of the statute, unless the flowage contract should be held to be a lease of "water power and lands and lots connected therewith." If it is possible to do so, such a construction of the contract

should be given as makes the contract valid rather than one which destroys it. No time having been stated in the contract it must be inferred that it was made with reference to the statute, and the contract should be read in the light of the statute under which the commissioners were acting. It is a well established rule that where one attempts to grant a greater estate than he has, the conveyance will be effective to pass what he has although the grant may be inoperative as to the larger estate. Disregarding the word "perpetually," it could not reasonably be contended that the lease extended longer than the term authorized by the statute. It will be noted that the word "perpetually" is not used to define the duration of the rights granted to Griswold, but it occurs in a clause defining the obligations assumed by Griswold. But in our opinion the word "perpetually," as used in this contract, should not be construed as meaning "forever." The question here is, what did the parties mean and how did they understand the term? The word "perpetually" does not always mean "forever." (*De-Florez v. Reynolds*, 8 Fed. Rep. 334; *State v. Payne*, 31 S. W. Rep. 797.) This court held in *People v. Chicago Telephone Co.* 220 Ill. 238, and *People v. Central Union Telephone Co.* 232 id. 260, that a grant to a corporation of a franchise without any limitation as to duration will not be held as a grant in perpetuity but will be limited to the life of the corporation to which it was granted; and the same rule was announced by the Supreme Court of the United States in *Blair v. City of Chicago*, 201 U. S. 400. In the case last above cited, on page 485, the Supreme Court of the United States said: "We cannot agree that the duration of these permits would be in perpetuity because of the fact that no time was named in them. The extension into Lake View was part of the north side railway system, which by the terms of the grants from the city were limited to twenty-five years, and no longer. There certainly could be no intention, in granting these permits from the super-

visors as extensions of the system, to make perpetual grants when the right of user of the main part of the line was expressly limited to twenty-five years, and their inference would be, that in extending this part of the system so as to make a portion of that already granted, such grants were to be for the same term as those already made."

Reading the statute, which authorized the canal commissioners to enter into this contract for a term of twenty years, in connection with the language of the instrument, and construing the word "perpetually" in view of the statute and the context of the contract, we think it means that the rights granted to Griswold are for twenty years, and that his obligation to maintain the tow-path bank in repair is co-terminous with the rights granted to him.

That this flowage contract was not understood by the parties thereto as conveying a perpetual right to Griswold to flow the property of the State therein described is shown by the fact that on January 6, 1905, the canal commissioners sold and conveyed to Griswold the parcel of land known as the sixteen-acre tract. This sixteen-acre tract is embraced in the flowage contract. If by such flowage contract Griswold obtained the right to flow said sixteen-acre tract in perpetuity, then there would have been no reason for his paying \$500 additional for a deed to said tract. This transaction shows that the parties themselves did not regard the flowage contract as a sale of an interest in the land itself. On the same day that the flowage contract was executed, and as a part of the same transaction between the canal commissioners and Griswold, a lease was executed of the ninety-foot reserve strip along the tow-path of the canal, describing said ninety-foot strip in the same way that it is described in the flowage contract, which said lease is for a term of twenty years from said second day of September, 1904. The lease was a general lease, in consideration of \$500. It is not stated in said lease what use is to be made of said ninety-foot reserve strip.

It is a familiar rule of construction that where different instruments are executed between the same parties and relating to the same subject matter, all of the instruments should be construed together in determining the real intention of the parties. This rule has often been applied by this court. (*Canterberry v. Miller*, 76 Ill. 355; *Wilson v. Roots*, 119 id. 379; *Gardt v. Brown*, 113 id. 475.) Applying this rule to the flowage contract and the lease of the ninety-foot strip, which also included the sixteen-acre tract, we have this situation: The canal commissioners leased to Griswold certain portions of the ninety-foot reserve strip, the sixteen-acre tract and certain privileges in regard to the Kankakee feeder for a term of twenty years. At the same time the flowage contract was executed, authorizing Griswold to flow the identical lands, as far as the ninety-foot strip and the sixteen-acre tract are concerned, as are mentioned in the twenty-year lease. Construing both these instruments together and as constituting parts of an entire transaction, there is little room to doubt that the parties intended that the flowage contract would terminate with the lease upon the same premises. The execution of the lease upon the ninety-foot strip was not an unusual transaction. The evidence shows that for many years the State has derived a very substantial revenue from leases of the ninety-foot strip. The report of the canal commissioners for 1895 and 1896 shows that approximately \$10,000 was received as rentals from the ninety-foot reserve strip. There is clear authority under the statute for making such leases, provided the lease shall not extend beyond twenty years, and provided also that where the lease is connected with a water power it can only be made in the manner provided in clause 6 of section 8 of the statute.

Appellant contends that the flowage contract and the lease constitute a water power lease, within the meaning of that term as it is used in clause 6 of section 8 of the statute. Appellant's position is, that since the statute forbids

the leasing of "any water power and lands or lots connected therewith," without complying with certain conditions as to advertising and appraising, and since the purpose of Griswold in obtaining these contracts was that he might use the demised premises in connection with the water power which he was intending to develop in the Desplaines river, therefore the lands and lots were connected with a water power and could not be leased without complying with the conditions of the statute, even though the water power in connection with which the premises were to be used did not belong to the State and had no connection whatever with the Illinois and Michigan canal. The fallacy of this contention is obvious. The "water power and lands or lots connected therewith," referred to in the sixth clause of section 8 of the statute, and which the canal commissioners cannot lease except by complying with the conditions imposed by the statute, are clearly the water power in the canal itself and the lands and lots connected therewith, which the State owns and which the canal commissioners are authorized to lease. It cannot be supposed that the legislature intended to give the canal commissioners the right to lease water power which the State did not own and over which it had no control whatever. The language of the sixth clause which authorizes the canal commissioners "to resume, without compensation to the lessee, the use of any such water power for the purpose of the canal, and also wholly to abandon or destroy the work by the construction of which the water privilege shall have been created," clearly shows that the water power which the commissioners had the power to lease was a water power which could be abandoned and the use of the water "resumed" whenever, "in the opinion of the legislature, said work shall cease to be advantageous to the State." There can be no doubt, it seems to us, of the meaning of this statute. It means that if a water power on the canal was leased and the drawing off of the water was found to interfere with

the use of the canal, the commissioners would have the power to cancel the lease and "resume" the use of the water for canal purposes without paying any compensation or damages to the lessee in consequence of such resumption by the State. As we have sought to show in our discussion of the question relating to the title of the State to the bed of the Desplaines river, appellee owns or controls the lands, upon both sides of the river, at the place where the dam is located. The State owned no portion of the land upon which the dam was located, in the bed of the river or on either side thereof, except the tow-path bank, to which one end of the dam was to be joined. There is therefore no basis for the argument that the flowage contract and the lease were void because they were connected with a water power privilege belonging to the State. No one would seriously contend that the owner of a farm on a river which might be affected by the construction of a dam below it would sell a water power which he did not own, simply by consenting to the flowage of his lands located above the dam. The lands embraced in the flowage contract and the lease were not used in connection with any water power on the canal. Appellee did not obtain its right to build the dam from the State, but this right, as we have seen, existed as an incident to its ownership of the land, on both sides of the river, at the place of its location.

There is a provision in the lease of September 2, 1904, which we are considering as a part of the transaction resulting in the execution of the flowage contract, which provides for a re-leasing at the expiration of the term or a renewal of the lease, provided the lessee is willing to pay as much as anyone else for the premises or an amount to be fixed by appraisal, but which should not, in any event, be less than the amount fixed in this lease. Appellant contends that the covenant for the renewal of the lease for twenty years longer was part and parcel of the leasing contract itself, which, being so construed, made the lease,

in effect, a lease for forty years, which renders it void under the statute. The power of the commissioners to provide for the renewal of leases from time to time, not exceeding twenty years at any one time, at a rental to be fixed by appraisement, is conferred by clause 6 of section 8, and is limited to leases of "water power and lands or lots connected therewith," and has no reference to leases made by private treaty of "canal lands or lots owned by the State," which are authorized to be made under clause 5 of section 8. The lease itself having been made under the fifth clause of section 8, the clause providing for the renewal for another term (provided for in clause 6) was improperly included in the lease. There is no warrant in the statute for inserting such provision in any leases other than those made of "water power and lands or lots connected therewith," under clause 6. Statutes delegating powers to public officers must be strictly construed, and all parties interested must look to the statute for a grant of power. (*Diederich v. Rose*, 228 Ill. 610, and cases there cited.) There being no statutory power in the commissioners to enter into the renewal provision in this lease, it necessarily follows that such provision must be held void.

But we are unable to concur in appellant's contention that the invalidity of this clause renders the entire contract void. It does not present a case where a part of an entire consideration for the promise or agreement, or a part of an entire promise, is illegal and void. The lease is a complete contract in all respects, obligating the lessee to pay the entire consideration for the lease for a term of twenty years. The clause relating to the renewal of the lease for twenty years more is an independent and severable covenant, which in no way affects the validity of the lease for a term of twenty years, as therein provided. The rule upon this subject is, that if a contract is made, consisting of two or more covenants, upon a valuable and legal consideration, and one of the covenants is illegal and the other is legal,

if the covenants are so distinct that that which is legal may be severed from that which is illegal, so that each covenant may be considered as a distinct contract, the legal covenant can be enforced and that which is illegal disregarded. (Page on Contracts, sec. 509; *Corcoran v. Lehigh Coal Co.* 138 Ill. 390.) In our opinion the lease in question falls under the rule above announced, and should be read and enforced as though the renewal clause was not in it.

The deed to the sixteen-acre tract.—On January 6, 1905, the canal commissioners made a quit-claim deed to this sixteen-acre tract to Harold T. Griswold, and appellee has succeeded to Griswold's title. Appellant contends that the canal trustees had no authority to execute the deed conveying this sixteen-acre tract to Griswold, and that, the deed being void, the title to said tract is still in the State, the protection of which will warrant a court of equity in enjoining the construction of the proposed dam. The charge made in the bill upon which the conclusion of invalidity is predicated is, that the premises conveyed were lands and lots connected with a water power privilege. The canal commissioners not being authorized by the statute to sell and convey water power privileges, or lands and lots connected therewith, it is sought to avoid this sale on that ground. The charge thus made in the bill is apparently abandoned in the briefs, but if it had not been so abandoned we do not regard the position as tenable. The deed is a conveyance to a low, marshy piece of land which the State owned, on the shore of the Desplaines river. While, as we have already seen, the conveyance of this strip carried the title to the thread of the stream, still there is not now, and never has been, any water power developed in the river opposite this strip of land. Besides, we have sought to show in our consideration of the flowage contract that the water power which the canal commissioners were prohibited from selling was water power connected with the canal itself. The evidence shows that prior to the sale

the canal commissioners applied to the Hon. Richard Yates, then Governor of the State, for his approval of the sale, and after such approval was given the sale was duly advertised in the manner and for the length of time required by the statute and the land sold to Harold T. Griswold for \$500, he being the highest and best bidder, and that said consideration was paid by the purchaser and a deed executed in pursuance of the sale. There is no claim that there was any fraud or collusion between the agents of the State and the purchaser at this sale. There is no reason to believe that the consideration was inadequate. This land had been carried by the canal commissioners on their books at an appraisal of \$408 and had not been sold, presumably because no one could be found willing to pay the appraised value for it. After holding it more than fifty years it was sold, as above stated, for \$500.

The principal reason urged in appellant's brief why this deed should be declared void is, that the sale was not made by the commissioners in person but by a third party who acted at the request of the commissioners. This objection, it will be seen, is not stated in the bill. But even if this point were properly pleaded and proven, it would amount to nothing more than a mere irregularity, which would not justify a court of equity in declaring the sale void, in the absence of any circumstances showing that the rights of the State had been prejudiced thereby. The power to make the sale is expressly vested by the statute in the canal commissioners. They sold the land in accordance with the formalities required by the statutes and executed a deed to the purchaser. The State received and retained the purchase money and has not offered to return any part of it. The State was, in legal contemplation, the grantor in the deed through its lawfully constituted agents. In *Gunnell v. Cock-erill*, 79 Ill. 79, and *McHany v. Schenk*, 88 id. 357, it was held that a sale made by an attorney of a mortgagee, under a power authorizing the mortgagee to sell, was a mere

irregularity, which would not affect the rights of innocent third parties who might afterwards acquire the title.

At the time of the sale and conveyance of the sixteen-acre tract to Griswold appellee had no connection either with the land or with Griswold. It was not until November, 1906, that appellee succeeded to Griswold's title to this land. The State took no steps to avoid the sale while the title was in the original purchaser. The records of the county exhibited a clear and unquestionable title in appellee's grantor. The irregularity complained of did not appear of record. Under these circumstances it would be a perversion of equitable principles to permit the State to have this deed declared void because of the irregularity complained of. In our opinion the deed is a valid conveyance of all interest the State then owned in the sixteen-acre tract.

The Kankakee feeder lease.—The Kankakee feeder has already been briefly described. It was constructed about the time the canal was completed. It was originally a navigable canal, forty feet wide at the top and twenty-six feet at the bottom, with a depth of four feet, except at its mouth, where it was five feet deep. Its purpose was to supply the canal, with which it connected, with water brought down from the Kankakee river. A wooden aqueduct resting on stone piers carried the water in the feeder over the Desplaines river to the right bank, near which the feeder flowed, into the Illinois and Michigan canal. This feeder has not been used since the canal was deepened so as to obtain a sufficient water supply from Lake Michigan. The right to remove what remained of the rock piers in the Desplaines river and to excavate the embankment of the feeder on the sixteen-acre tract north of the river and south of the canal so as to discharge the waters through section 31 in the proper manner was granted by the canal commissioners by the third clause of the flowage contract, and was included in the lease of September 2, 1904, which

have already had our consideration. On August 8, 1905, another lease was executed by the canal commissioners to Griswold, purporting to lease to him for twenty years all rights which the State had, under the control of the canal commissioners, to divert the water of the Kankakee river into the Kankakee feeder and to discharge the same into the Desplaines river in said section 31, together with the right to restore the dam across the Kankakee river, and such right as the State had to construct, at each end of the feeder, suitable gates to control the water of the Kankakee river through such feeder, and to enter upon the Kankakee feeder for the purpose of repairing the banks thereof,—all of which rights were granted subject to the rights of the Atchison, Topeka and Santa Fe Railroad Company and the Chicago and Alton Railroad Company, both of which have solid embankments across the feeder and the ninety-foot strip on the side thereof. Said lease gave to Griswold the option of abandoning the premises at any time after five years by giving notice and restoring the feeder to its present condition, if required so to do. Said lease also provided that the canal commissioners might cancel the lease at any time, “whenever, in the judgment of the canal commissioners or other proper officers of the State having charge of canal property, they shall deem the interest of the State required it to re-possess and use the property for State purposes.” Said lease was made in consideration of \$150 per annum, payable on the tenth day of August, 1905, and on the tenth day of August in each and every year of said term. The lease also contained a renewal clause similar to that already discussed in reference to the lease of September 2, 1904. On November 27, 1907, the legislature adopted the following joint resolution:

“Whereas, the canal commissioners appointed under and by virtue of ‘An act to revise the law in relation to the Illinois and Michigan canal and for the improvement of the Illinois and Little Wabash rivers,’ approved March 27, 1874, in force July 1, 1874, have at various times heretofore executed leases of water power

and water privileges to private individuals and corporations, under and by virtue of the powers granted to said commissioners by section 8 of the above entitled act, and that among the said leases were certain alleged leases or agreements to Harold T. Griswold, dated September 2, A. D. 1904, purporting to grant and convey certain rights and privileges in and to the waters and water power of the Desplaines and Kankakee rivers; and whereas, the said Harold T. Griswold or his assignees, by virtue of said alleged leases or agreements, are building and constructing certain dams, controlling works, locks and other obstructions in and across said streams, which, in the opinion of this General Assembly, are destructive of the navigation of said streams and to the disadvantage of the State of Illinois; and whereas, the sixth clause of section 3 (8) of said act provides, among other things, as follows: 'All leases of water power and extensions thereof shall be subject to the right of the commissioners to resume, without compensation to the lessee, the use of any such water power for the purposes of the canal, and also wholly to abandon or destroy the work by the construction of which the water privilege shall have been created, whenever, in the opinion of the legislature, such work shall cease to be advantageous to the State;' and whereas, the construction of such dams, controlling works, locks and other obstructions being erected and constructed by the said Harold T. Griswold or his assigns have ceased to be advantageous to the State, and that such water power and water privileges purporting to have been granted in and by virtue of said alleged leases or agreements are necessary for the purpose of the canal; therefore be it

"Resolved by the House of Representatives, the Senate concurring therein, That the said canal commissioners are hereby empowered and directed to cancel and annul said alleged leases or agreements and any and all extensions thereof, and to resume all such water power and water privileges therein purported to have been granted to the said Harold T. Griswold by the said canal commissioners on September 2, A. D. 1904, and that said water power and water privileges be restored for the purpose of the canal, and that all such dams, controlling works, locks and other obstructions therein existing for the purpose of creating such water power and water privileges be forthwith abandoned and destroyed by such canal commissioners."

Appellant contends that the adoption of this resolution had the effect of canceling this lease, and assigns two reasons therefor: (1) Because the legislature is the "proper officers of the State in charge of canal property," within the meaning of the language of the lease whereby the right to cancel is reserved; (2) that said contract is a lease of

water power, and that the State had the right, under the statute, to resume the use of the water and cancel the lease "whenever, in the opinion of the legislature," it was advantageous to the State to do so. Neither of these contentions can be sustained. The clause in the lease reserving the right to cancel it to "the canal commissioners or other proper officers of the State at such time having charge of canal property," means that the canal commissioners, or such other officers or agents as the State may designate by law to have charge of the canal properties instead of the canal commissioners, shall exercise the right of cancellation. If the State should abolish the board of canal commissioners and create some other agency to have charge of canal property, such other substituted agency could probably exercise the right of cancellation. The right to declare this contract at an end by one party thereto without the consent of the other party should be strictly construed, and so long as the State continues the board of canal commissioners in charge of canal property they are the only officers who can exercise this reserve right. The right under the contract does not arise until in the judgment of the canal commissioners "the interest of the State requires it to re-possess and use such property for State purposes." The discretion or judgment to be exercised, under the terms of the agreement, by the canal commissioners cannot be exercised by other State officials in another department of the State government. The second ground is equally untenable. This lease is not a water power lease, within the meaning of the statute. We have already expressed our views as to the meaning of water power leases, and for the reasons heretofore given appellant's second point cannot be sustained. If this contract was a water power lease, or lands and lots connected therewith, it would be void for other reasons, regardless of the legislature's resolution.

There is still another reason why this lease is not affected by the joint resolution. It will be seen that the reso-

lution is directed against certain leases made to Harold T. Griswold on September 2, 1904. Apparently this resolution refers to the flowage contract, the lease of the ninety-foot strip and the pole lease, which were the only contracts executed between the canal commissioners and Griswold on that day. The Kankakee feeder lease was executed August 8, 1905, and therefore does not come within the purview of the joint resolution. The observations which we have heretofore made in reference to the renewal clause will apply to appellant's objection based on that clause in the lease now under consideration.

Appellant contends further that this lease is void because the Kankakee feeder is an integral part of the canal, and that the commissioners, under no circumstances, have any power to lease the canal itself or any of its parts. Undoubtedly this view is sound as applied to leases which would interfere with the uses of the canal for navigation purposes. All the powers of the canal commissioners should be exercised in such way as to promote the object for which the canal was constructed. All of the powers granted to the canal commissioners have been carefully safeguarded, so that their exercise would promote, and not obstruct or defeat, the primary object the State had in view in lending its generous patronage to this great public enterprise. The Kankakee feeder was originally a necessary part of the canal. It was used not only to supply the canal with necessary water, but the feeder was also used as a navigable canal, through which boats passed back and forth between the Kankakee river and the Illinois and Michigan canal. As already pointed out, about the year 1888 the use of this feeder was discontinued. The dam in the Kankakee river below the head of the canal, which had been used to divert the water of the Kankakee river into the feeder, had been removed and the river restored to its original channel. The wooden aqueduct and the stone piers upon which it stood, through which the waters of the feeder were passed over

the Desplaines river, had been allowed to fall into decay. The mouth of the feeder had been filled up under the direction of the canal commissioners. Two railroads had been permitted to construct solid embankments across the feeder, upon which they maintain tracks and operate railroads. Farmers owning lands along the feeder have been allowed to cut down the banks and run fences across the feeder without restriction. There is not the remotest probability that this feeder will ever again be used by the State in connection with the canal.

It appears from the foregoing facts that the validity of the lease of this feeder cannot be questioned on the ground that the exercising of the rights granted will interfere in any way with the rights of the State or the public in the canal. With an ample supply of water from Lake Michigan it is not within the range of reasonable probability that this channel will ever be needed to feed the canal. Engineer Cooley testified that he could not foresee any state or condition which would render its future use necessary. But even if we may suppose a possibility that this feeder may be again needed by the State, the power to cancel this lease is expressly reserved to the canal commissioners. Again, if such necessity should arise, the things that the lessee is authorized to do by this lease would seem to be in line with the reconstruction of such feeder so that it would become usable. The lessee is authorized to reconstruct the dam in the Kankakee river, to repair the banks of the feeder and to perform other work necessary to cause the water to again pass through the feeder, all of which would be advantageous to the State should it again desire to use this channel. In our opinion there is no legal reason why the canal commissioners may not treat this abandoned feeder, and the lands and lots connected therewith, as other canal property, and lease the same during such time as it is not needed, for any lawful purpose that does not interfere with whatever rights the State may have to resume the use of this

feeder for canal purposes. The title of the State to this feeder was not acquired by a grant from the United States government, as was the case with the canal proper, but the right of way for the feeder was obtained, in part, at least, by deeds from private owners of the lands over which it passed. A number of such deeds were introduced at the trial, and all of them contained the following condition: "Provided, however, if the said feeder should not be constructed over and through the said premises, or if, after the construction of the same, it should be by the decision of the board of trustees, their successors or assigns, abandoned and discontinued or the route thereof changed so as not to be continued over the said premises, then and in that case the said lands hereby granted shall revert to the said and assigns." The blank in the last line was filled in with the name of the grantor. The evidence shows that as to a portion of the right of way for the feeder no paper title in the State could be found. It thus appears that a question may arise between the State and those entitled to the reversionary interest under the deeds, whether the State has any title or interest in the right of way of this feeder. This question we do not determine. The claimants of such reversionary interests are not parties to this suit. Such rights, whatever they may be, will not be affected by the lease or anything that may be done by appellee thereunder. Without determining whether the State has any title or rights in the right of way of this feeder as against persons who may have succeeded to the reversion, and without deciding that the lessee has acquired any rights under the said lease as against such reversioners, our conclusion is that, as between the State on the one hand and the appellee on the other, no legal reason exists why this contract should be declared void.

The pole lease.—The contract designated "the pole lease" was executed September 2, 1904, between the canal commissioners and Griswold, and grants to the lessee the

the feeder has been allowed to fall into decay. The water in the feeder has been filled up under the direction of the canal commissioners. Two railroads had been permitted to construct and maintain tracks across the feeder, and while they maintain tracks and operate railroads. Farmers owning lands along the feeder have been allowed to run over the tracks and run fences across the feeder without restriction. There is not the remotest probability that this feeder will ever again be used by the State in connection with the canal.

It appears from the foregoing facts that the validity of the lease of this feeder cannot be questioned on the ground that the exercising of the rights granted will interfere in any way with the rights of the State or the public in the canal. With an ample supply of water from Lake Michigan it is not within the range of reasonable probability that this channel will ever be needed to feed the canal. Engineer Conley testified that he could not foresee any state or condition which would render its future use necessary. If even if we may suppose a possibility that this feeder may be again needed by the State, the power to cancel this lease is expressly reserved to the canal commissioners. As if such necessity should arise, the things that the lessee is authorized to do by this lease would seem to be in line with the reconstruction of such feeder so that it would be usable. The lessee is authorized to reconstruct the feeder, to reconstruct the Kankakee river, to repair the banks of the feeder, to perform other work necessary to cause the water to pass through the feeder, all of which would be advantageous to the State should it again desire to use this feeder. In our opinion there is no legal reason why the canal commissioners may not treat this feeder, the lands and lots connected therewith, as other canal lands and lease the same during the term of the lease for any lawful purpose that does not interfere with the ever rights the State has in the canal.

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right to erect and maintain a line of poles along and upon the land belonging to the State, part and parcel of the Illinois and Michigan canal lands, to be located between the west line of section 25, township 34, range 8, in Grundy county, to Roby street, in the city of Joliet, in Will county, and between said west line of said section 25 and the western limits of the city of Morris, said line of poles to be placed on the berm side of the canal under the directions of the officers of the canal. Said lease is for a term of twenty years, and is made subject to existing pole leases, and also subject to the right to require a change in the location of the poles at any time when, in the judgment of the superintendent or person in charge of the canal property, such change is necessary. The consideration paid for this lease is \$1000. Said poles are to be used by the lessee only in stringing wires to carry electricity generated at the proposed plant. The lessee agrees and covenants to erect and maintain the poles and wires in a good and workmanlike manner and in such way as not to interfere with the business of the canal or the property of others, and to assume all liability for deaths or personal injuries that may result from the use of such poles and wires, and to indemnify and save harmless the canal commissioners for all claims for damages to either persons or property. Neither this lease nor the Kankakee feeder lease is of vital importance to the decision of the appellant's right to enjoin the construction of the proposed dam. Whatever view we might entertain in respect to these two contracts, it could not influence the ultimate result of this litigation. There are no reasons urged against the validity of the pole lease which have not been considered in connection with the other contracts, except that appellant contends that the pole lease gave the lessee the control of the tow-path of the canal for a distance of twenty-five miles. This is a misapprehension. The poles are to be placed on the berm side of the canal, which is the opposite side from the tow-path, except

"where, in the judgment of said superintendent or officer, the topography of the ground makes it necessary or expedient to have said poles upon the tow-path bank of said canal, the authority is hereby given to said party of the second part to cross said canal and place poles along the said tow-path bank, the necessity or expediency thereof, the place and manner of crossing and placing said poles along said tow-path bank to be subject to the approval and under the direction and supervision of said superintendent or officer. It is distinctly understood, however, that the aforesaid line of poles shall not, in any event, be located or maintained in such place or manner as to interfere with the use or operation of said canal." As thus carefully guarded we are unable to see how it will interfere with the use of the canal or the tow-path. Unless it does so interfere, we see no reason why the contract should be declared void.

Conclusion.—It is seldom a case is presented to a court involving so many questions, both of law and fact, as are presented by this record. We have given the questions involved that careful consideration which their importance seems to demand. In view of the wide range covered by the evidence and the able and exhaustive arguments of counsel we have found it impracticable to discuss all of the questions raised or notice in detail all of the arguments presented, within the reasonable bounds of an opinion. We have, however, considered all of the questions, and discussed such of them in the preceding opinion as appear to be necessary to a proper determination of the legal rights of the parties. After giving due consideration to all that has been said by counsel in support of the several contentions of the State, together with such additional matters as our own investigation has disclosed, we have reached the conclusion that there is no equity in appellant's bill and that the same was properly dismissed by the court below.

The decree is affirmed.

Decree affirmed.

FLORENCE McLAUGHLIN *et al.* Plaintiffs in Error, *vs.* FRED-
ERICK R. McLAUGHLIN *et al.* Defendants in Error.

Opinion filed October 26, 1909.

1. *DEEDS—when law presumes undue influence.* In the case of a deed from child to parent, client to attorney or ward to guardian the law presumes undue influence, and if the good faith of the transaction is challenged the grantee has the burden of establishing such good faith.

2. *SAME—the law does not presume undue influence in case of deed from parent to child.* In the case of a deed from parent to child the law does not presume undue influence, and if any such presumption arises it must arise as a presumption of fact, based upon proof that the natural dominion of the parent has ceased and that his will has been overcome by that of the child, so that his act is not his own but the act of the child.

3. *SAME—when the grantee is not required to prove good faith.* The grantee in a deed from father to son is not required to sustain the deed by proving the good faith of the transaction, unless the evidence shows that the grantor, by reason of old age or other condition, has become subject to the dominion of the grantee.

4. *SAME—fact that grantor divides property unequally is not evidence of mental weakness.* A father may divide his property unequally among his children and may prefer one and cut off another, with or without reason; and the mere fact that he deeds the principal part of his property to his sons instead of dividing it equally among his sons and daughters is not evidence of mental weakness upon his part.

5. *SAME—old age and feebleness not ground for setting aside deeds.* If a father has sufficient mental capacity to comprehend naturally the transactions in which he is engaged when he conveys the principal part of his land to his sons, the mere fact that he was advanced in years and enfeebled by sickness is not ground for setting aside the deeds.

WRIT OF ERROR to the Circuit Court of Scott county;
the Hon. OWEN P. THOMPSON, Judge, presiding.

WILLIAMS & WILLIAMS, and T. J. & J. O. PRIEST, for
plaintiffs in error.

BELLATTI, BARNES & BELLATTI, (R. M. RIGGS, of coun-
sel,) for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by Florence McLaughlin and Mary Cumby, the daughters of Adam McLaughlin, deceased, in the circuit court of Scott county, against William L. McLaughlin, Daniel H. McLaughlin, John P. McLaughlin, Henry T. McLaughlin and Frederick R. McLaughlin, the sons of Adam McLaughlin, to set aside eight deeds made by Adam McLaughlin during his lifetime, viz., one deed bearing date March 14, 1891, from Adam McLaughlin to John P. McLaughlin, for the west half of the east half of the north-west quarter of section 13, township 13, north, range 13, west of the third principal meridian, Scott county, Illinois; one deed bearing date September 29, 1891, from Adam McLaughlin to Henry T. McLaughlin, for the west half of the south-east quarter of section 6, in township 13, north, range 12, west of the third principal meridian, Scott county, Illinois; one deed bearing date December 19, 1896, from Adam McLaughlin to Fred R. McLaughlin, for the north-east quarter of the south-west quarter of section 12, township 13, north, range 13, west of the third principal meridian, Scott county, Illinois; one deed bearing date January 21, 1897, from Adam McLaughlin to John P. McLaughlin, for the west half of the north-west quarter and the west half of the east half of the north-west quarter of section 13, in township 13, north, range 13, west of the third principal meridian, Scott county, Illinois; one deed bearing date January 29, 1897, from Adam McLaughlin to Fred R. McLaughlin, for the south one-half of the south-west quarter of section 12, in township 13, north, range 13, west of the third principal meridian, Scott county, Illinois; one deed bearing date January 29, 1897, from Adam McLaughlin to William L. McLaughlin, for the east half of the south-east quarter of section 6, in township 13, north, range 12, west of the third principal meridian, Scott county, Illinois; one deed bearing date February 28, 1907, from Adam McLaughlin to

John P. McLaughlin, for the west half of the north-west quarter of section 13, township 13, north, range 13, west of the third principal meridian, Scott county, Illinois, this deed being made to correct a mistake in the deed to John P. McLaughlin bearing date January 21, 1897; also one deed bearing date January 2, 1894, from Adam McLaughlin to Daniel H. McLaughlin, for the south-east quarter of section 28, in township 17, range 5, situated in Piatt county, Illinois. The lands conveyed by said deeds aggregate six hundred acres. Answers and replications were filed and the testimony was taken before a master, and reported to the court, and upon a hearing a decree was entered dismissing the bill for want of equity, and the complainants have sued out a writ of error from this court to review said decree.

Three grounds are relied upon for relief: First, that said deeds were without consideration; second, that at the time the said deeds were executed Adam McLaughlin was without sufficient mental capacity to execute the same; and third, that their execution was obtained through the undue influence of said William L. McLaughlin, Daniel H. McLaughlin, John P. McLaughlin, Henry T. McLaughlin and Frederick R. McLaughlin over Adam McLaughlin, their father.

The evidence found in this record fairly tends to establish that Adam McLaughlin, prior to the year 1891, was the owner of said lands and a considerable amount of personal property; that prior to the year 1878 he and his family lived upon and farmed said lands; that in that year he and his wife moved to Winchester, a village situated some eight or ten miles from said lands, where he purchased a small house and continued to reside with his wife for a year or two when he had some trouble with his wife, when they separated and Adam McLaughlin returned to the farm, his wife continuing to reside in Winchester. The two daughters, Florence McLaughlin and Mary Cumby, appear to have been in sympathy with their mother, and

Florence McLaughlin thereafter made her home with her mother, and the sons appear to have sympathized with their father and remained upon the farm, and after Adam McLaughlin returned to the farm he resided with one of the boys, who lived upon the home place. The differences between Mr. and Mrs. McLaughlin having been compromised by Adam McLaughlin paying to Mrs. McLaughlin a certain sum per annum for her maintenance and support, they remained separate and apart until the death of Mrs. McLaughlin, which occurred some two or three years prior to the death of Adam McLaughlin, which took place on April 26, 1907. After the return of Adam McLaughlin to the farm he gave to each of his sons eighty acres of land and made to them deeds therefor, and sold to John P. McLaughlin eighty acres of land, to Fred R. McLaughlin forty acres of land and to Daniel H. McLaughlin eighty acres of land, and at the time of his death he owned one hundred and fifty acres of farm land, the house and lot in Winchester where his wife lived until her death, and a considerable amount of personal property, and was indebted to the amount of \$4000. At the time Adam McLaughlin gave to his sons said lands the deeds were not signed by his wife and he reserved the possession thereof during his life, or the grantees agreed to pay him during his natural life the fair rental value thereof.

While Adam McLaughlin was uneducated, he appears to have been a successful farmer and stock raiser and to have accumulated a large property. In the year 1891 he had a severe and protracted illness, and, while he substantially recovered, he was never as vigorous, physically or mentally, as he was before that illness. After that time, however, he carried on his farm, bought and sold stock, purchased and sold land, kept a bank account, and drew checks and executed promissory notes and carried on his business substantially as he had done before. A large number of witnesses were called and testified as to the mental

condition of Adam McLaughlin and there was a great conflict in their testimony. There is no evidence to sustain the claim of undue influence, and it is substantially admitted that the deeds were made by Adam McLaughlin to his sons in consideration of love and affection, as to eighty acres of land conveyed to each son. There is no force, therefore, in the contentions that the deeds were without consideration and were the result of undue influence. The only question we need consider, therefore, is, did Adam McLaughlin have sufficient mental capacity to make said deeds?

It appears that Adam McLaughlin was a nervous man; that at times his face, hands, arms and legs would twitch and jerk; that he would imagine at times that someone was attempting to break into his house at night; that he would call out in his sleep and pound upon the head of the bed with his fists, and was afraid to stay alone at night, and did not talk consecutively with his friends and neighbors, but would leave a subject, as one witness expressed it, and commence upon another subject before he had finished the first subject; and the witnesses who testified Adam McLaughlin was incompetent to make a deed based their opinions mainly upon some such peculiarity as his being afraid of thunder storms, or imagining that someone had attempted to break into his house, or the fact that he was unable to control his arms or legs when he was sitting or walking, but all of those witnesses admitted that with the assistance of his wife and sons he had carried on a large farm and transacted successfully the business of a farmer and stock raiser. On the other hand, some fifty witnesses, consisting of physicians, lawyers, ministers of the gospel, merchants, bankers, farmers and laborers, who had known Adam McLaughlin all his life, testified he was a successful farmer and stock raiser, and that he continued to transact business in a successful and rational manner up to the time of his death. From the evidence found in the record we are impressed with the fact that Adam McLaughlin was mentally

competent to make the deeds to his sons whose execution is challenged by the plaintiffs in error.

It is said in the argument of plaintiffs in error that a confidential relation existed between the defendants in error and Adam McLaughlin, and that the burden of proof was upon the defendants in error to sustain said deeds. Such is not the law of this State. Where a child executes a deed to the parent, a client to his attorney or a ward to his guardian, if the good faith of the transaction is challenged the law casts upon the parent, attorney or guardian the burden of establishing the good faith of the transaction. No such requirement exists, however, where a parent executes a deed to a child, unless the evidence establishes that the parent, by reason of old age or other infirmity, has become subject to the dominion of the child. In the case of a deed from a child to a parent the presumption of undue influence arises as a matter of law, but in case of a deed from a parent to a child no such presumption of law arises. But if such presumption arises it must arise as a presumption of fact, based upon the proof that the natural dominion of the parent over the child has ceased to exist, and that by reason of the weakness of the parent and the strength of the child the will of the parent has been overcome by the will of the child, and that the act of the parent was not his own act but the act of the child. *Burt v. Quisenberry*, 132 Ill. 385; *Oliphant v. Liversidge*, 142 id. 160; *Bishop v. Hilliard*, 227 id. 382; *Sears v. Vaughan*, 230 id. 572.

There is no rule of law which requires the parent to distribute his property equally among his children. He may prefer one and cut off another, with or without any reason, and the fact that Adam McLaughlin gave the principal part of his real estate to his sons was no evidence of mental weakness on his part; and the fact that Adam McLaughlin was advanced in years and perhaps somewhat enfeebled in mind by sickness, if he had sufficient mental capacity to

comprehend naturally the transactions in which he was engaged at the time he conveyed to his sons said lands, as we think the evidence amply showed he had, is no reason why the deeds to the sons should be set aside by a court of chancery. *Miller v. Craig*, 36 Ill. 109; *Myatt v. Walker*, 44 id. 485; *Lindsey v. Lindsey*, 50 id. 79; *Burt v. Quisenberry*, *supra*.

Finding no reversible error in this record the decree of the circuit court is affirmed.

Decree affirmed.

WILLIAM A. LEE, Appellee, vs. THE REPUBLIC IRON AND STEEL COMPANY, Appellant.

Opinion filed October 26, 1909.

1. LIMITATIONS—*statute is no defense to amended declaration if original declaration stated cause of action.* If the original declaration in a personal injury case fails to state any cause of action, an amended declaration, filed after the statutory period of limitation has run, is open to a plea of the Statute of Limitations; but if the original declaration states a cause of action but states it defectively, an amended declaration re-stating the same cause of action with more particularity is not subject to such defense.

2. NEGLIGENCE—*what is the cause of action in a personal injury case.* The cause of action in a suit for damages arising from negligence is the act done or omitted to be done by the defendant affecting the plaintiff which causes a grievance for which the law gives a remedy.

3. PLEADING—*when amendments do not state new cause of action.* Where the counts of the original declaration charge a failure of the defendant to furnish the plaintiff a safe place to work or a safe appliance to work with, or with negligently ordering him to do work in an unsafe manner, amended counts charging the same acts or omissions but alleging the facts with more particularity do not state a different cause of action.

4. SAME—*when changing averments as to facts does not make new case.* Amendments eliminating from one count in the declaration an averment that the plaintiff knew of the defective condition of the belt he was handling but continued to work in reliance upon defendant's promise to repair, and inserting in other counts

the averments that the dangerous condition of the belt and the danger attending the manner in which plaintiff was ordered to do the work were known to the defendant but not to the plaintiff, do not state a new cause of action.

5. MASTER AND SERVANT—*when question of assumed risk is for the jury.* Whether a servant assumed the risk of injury is a question for the jury, where the declaration avers with particularity that he was acting under orders of his foreman in standing on an angle-bar while attempting to repair a belt and that he did not know of a certain defective condition of the belt, which the evidence tends to show was, in fact, unknown to him, and was, taken in connection with the place where he was standing, the cause of his injury.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Rock Island county; the Hon. EMERY C. GRAVES, Judge, presiding.

This was an action on the case commenced by William A. Lee, the appellee, against the Republic Iron and Steel Company, the appellant, in the circuit court of Rock Island county, to recover damages for a personal injury alleged to have been sustained by the appellee while he was in the employ of the appellant, in consequence of the negligence of the appellant. A trial resulted in a judgment in favor of the appellee for \$10,000, which judgment was affirmed by the Appellate Court for the Second District. (126 Ill. App. 297.) The judgment, however, on a further appeal to this court was reversed (227 Ill. 246,) and the cause was remanded to the circuit court for a new trial. On the case being re-docketed a second trial was had, which resulted in a judgment for \$11,083, which judgment was affirmed by the Appellate Court for the Second District for the sum of \$8083, after a *remittitur* of \$3000 had been required by that court, and a second appeal has been prosecuted to this court.

The original declaration contained three counts. The substance of each count of that declaration and a statement

of the facts surrounding the appellee at the time he was injured will be found in the opinion of this court filed when the case was first here, and it will not be necessary to restate in this opinion the allegations of the original declaration or the facts established by the evidence on the last trial, which are substantially the same as the facts proven on the first trial.

When the case was here before it was held the appellee assumed the risk of being injured arising from the defects which form the basis for the charges of negligence contained in the first and second counts of the original declaration, and that there was a fatal variance between the proof and the allegations of the third count of that declaration, in this: that in that count the appellee averred he had knowledge of the existence of the dangerous condition of the staples and tacks in the end of the belt which he was handling at the time he was injured and relied upon the promise of appellant to repair said belt, while the evidence in that trial, as well as the evidence in this trial, showed that he did not have such knowledge and did not rely upon a promise to repair. After the case was re-docketed in the circuit court the appellee amended each count of the original declaration and filed a new count, which is designated in the briefs as the fourth count of the declaration. The first count was amended by inserting therein an averment that the appellee was commanded by his foreman to stand upon the angle-bar while handling the end of the belt which was being repaired, and that the appellant did not furnish him a reasonably safe place in which to work, and that the appellant negligently suffered the end of said belt which appellee was handling to become out of repair and in a dangerous condition by reason of certain staples and tacks which had been used in repairing the same, which conditions were known to the appellant but which were unknown to the appellee. The second count was amended by inserting therein an allegation that the foreman of appellee gave him a neg-

ligent order concerning the manner of repairing said belt while it was suspended from said shaft while in motion, of which danger the appellee did not have notice while the appellant did; and the third count was amended by eliminating therefrom the allegation that the appellee had notice of the dangerous condition of the staples and tacks in the end of the belt which he was handling, which made it dangerous to handle, and that he relied upon a promise to repair; and the fourth, or new, count of the declaration was substantially the same as the third count after it had been amended.

RICHARD JONES, JR., and PEEK & DEITZ, for appellant:

The Statute of Limitations may be successfully pleaded to an amended declaration filed after the statute has run and setting up a new and different cause of action from that contained in the original declaration, otherwise the protection intended to be given by the statute would be substantially broken down. *Railway Co. v. Cobb, Christy & Co.* 64 Ill. 128; *Eylenfeldt v. Steel Co.* 165 id. 185; *Phelps v. Railway Co.* 94 id. 548; *Gaylord v. Swift*, 229 id. 330.

A "cause of action," as used in pleadings, is every fact which it is necessary to establish in order to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse, and which, if successfully traversed by him, would defeat the action. It comprises every fact which, if traversed, the plaintiff must prove in order to obtain a judgment, and consists of all facts essential to show (1) that the plaintiff had and was in the right; (2) a correlative duty or obligation resting on the defendant; and (3) some act or omission by the defendant in violation of that duty and resulting in an injury to that right. *Reed v. Brown*, 22 Q. B. Div. 128; 1 Cyc. 641, and cases cited; *Oliver v. Columbia N. & R. L. Co.* 55 S. C. 541; *Bucklin v. Ford*, 5 Barb. 393; *Meyers v. VonCollen*, 28 id.

230; *Douglas v. Forrest*, 4 Bing. 704; *Railroad Co. v. Schroeder*, 44 Pac. Rep. 1096.

Where, in a declaration, any fact (whether tending to show the right, the duty, the breach of duty or the injury,) essential to the recovery is omitted, such declaration does not state a cause of action; and a subsequent amended declaration in which the omission is supplied is, by force of the logic involved, held to state a different cause of action and to be amenable to a plea of the Statute of Limitations. *Foster v. St. Luke's Hospital*, 191 Ill. 95; *Doyle v. Sycamore*, 193 id. 501; *Eylenfeldt v. Steel Co.* 165 id. 185.

The recognized tests of whether an amended declaration states a new cause of action from that set up in the original declaration, so as to be amenable to a plea of the Statute of Limitations, are: (1) Whether the same evidence is admissible under both; (2) whether the evidence in defense as to the one could be relied upon as a defense to the other; and (3) whether the former avers any material fact not contained in the latter, the successful traverse of which fact would defeat the action. The amended declaration in this case therefore stated a new cause of action. *Railway Co. v. Leach*, 182 Ill. 359; *Railroad Co. v. Blymer*, 214 id. 579; *Gaylord v. Swift*, 229 id. 330.

It was essential to appellee's case that he aver and prove either that he did not know of the defect which caused the injury and was not chargeable with knowledge of it, or that he knew of it and that circumstances were such that he had not assumed the risk. *Steel Co. v. Lee*, 227 Ill. 246; *Sargent Co. v. Baublis*, 215 id. 428.

Appellee assumed the risk of the injury from the entire negligence of the appellant charged in both declarations, except upon his proof of the additional averments contained in the amended declaration, alone, that he did not know of the existence of the staples in the belt. *Sargent Co. v. Baublis*, 215 Ill. 428; *Steel Co. v. Lee*, 227 id. 246.

W. R. MOORE, for appellee:

When the amendment in an additional count is introduced merely to re-state in a different form the same cause of action mentioned in the declaration as originally drawn, and not to present a new and different cause of action, a plea of the Statute of Limitations to such new count is not proper. *Rolling Mill Co. v. Monka*, 107 Ill. 340.

Where the original declaration avers that plaintiff received his injury by reason of his master's failure to keep the machinery in repair, the unsafe condition of which was unknown to plaintiff, an additional count averring that upon notification by plaintiff of the defect the master promised to repair the same does not set up a new cause of action. *Swift & Co. v. Madden*, 165 Ill. 41.

The Statute of Limitations, requiring a suit for personal injury to be brought within two years, does not apply to matters of mere pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement of it at all. *Railway Co. v. Hackendahl*, 188 Ill. 300.

A cause of action for the death of a servant is the act or thing omitted to be done by the master which confers the right upon the servant's representative to sue, or the act which causes a grievance for which the law affords a remedy. *Swift & Co. v. Gaylord*, 229 Ill. 330.

The duty of the master to provide a reasonably safe place for the servant to work is a positive one, and his non-compliance therewith is not one of the ordinary risks assumed by the servant. *Armour v. Golkowska*, 202 Ill. 144.

A master cannot delegate to another the duty of furnishing his servant a safe place to work, so as to relieve himself from liability for the negligence of such duty. *Coal Co. v. Rowatt*, 196 Ill. 156.

A servant does not assume risks which are not ordinarily connected with the service, and which are due to a

failure of the master to exercise reasonable care and prudence. *Railroad Co. v. Kneirim*, 152 Ill. 458; *Coal Co. v. Clark*, 197 id. 514.

Where an injury to a servant was caused by the wrongful and negligent order of his master, the servant himself being without fault, there is no room for the application of the doctrine of assumed risk. *Wells & French Co. v. Kapaczynski*, 218 Ill. 149.

Mr. JUSTICE HAND delivered the opinion of the court:

The first contention of the appellant is, that the evidence introduced on behalf of the appellee did not tend to support the cause of action set forth in his amended declaration, and for that reason the court erred in declining to take the case from the jury, upon its motion, at the close of all the evidence. The evidence found in this record is substantially the same as that found in the record when the case was here before, and we think required that the case be submitted to the jury.

It is next contended that the amended declaration stated a new cause of action, and that the court erred in sustaining a demurrer to the pleas of the Statute of Limitations filed thereto by the appellant. Especially is such contention insisted upon as to the pleas of the Statute of Limitations filed to the third count of the declaration. If the original declaration failed to state a cause of action the demurrer should have been overruled to the pleas of the Statute of Limitations. If, however, it stated a cause of action, though defectively, the defects therein could be cured by an amendment, and the court did not err in sustaining a demurrer to said pleas. In *Swift & Co. v. Madden*, 165 Ill. 41, it was held that the cause of action in suits for damages arising from negligence is the act done or omitted to be done by the defendant, affecting the plaintiff, which causes a grievance for which the law gives a remedy. And in *Swift Co. v. Gaylord*, 229 Ill. 330, on page 334, it was said: "In

cases of this kind the cause of action is the act or thing done or omitted to be done by one which confers the right upon another to sue,—in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy.”

Each of the counts in this declaration rests upon the alleged failure of the appellant to furnish the appellee a safe place in which to work or a safe appliance with which to work, or with negligently ordering him to do the work in which he was engaged, in an unsafe manner. Each count of the original declaration rested upon a failure of the appellant in like particulars, although the facts averred in that declaration were not averred with the same particularity that they were in the declaration upon which the last trial was had. We think, from a comparison of the counts in the original declaration and in the present declaration, that the cause of action set out in the declaration upon which this case was tried was the same cause of action set up in the original declaration.

It is next contended that the appellee assumed the risk of being injured in the manner in which he was injured, and that he cannot, for that reason, recover. The declaration upon which this trial was had averred with particularity that the appellee was acting under the orders of his foreman in going upon the angle-bar, and that he was not advised as to the dangerous condition of the end of the belt which he was assisting in repairing at the time that he was injured, and which defective condition the evidence tends to show was the cause of his injury, taken in connection with the place in which he stood at the time he was injured. The question of assumed risk is usually a question of fact and not a question of law, and we think it cannot be held, in view of the evidence in this case, that the appellee assumed the risk of being injured in the manner in which he was injured, but that the court properly submitted the question of assumed risk to the jury.

It is finally objected that the court improperly admitted in evidence the testimony of the witnesses Pickup and Witte as to the proper manner in which the belt should have been repaired, the end of which appellee was handling at the time he was injured. Those witnesses appeared to have been experienced workmen and familiar with the method of doing the kind of work about which they testified, and the appellant called a number of witnesses, in rebuttal, upon the same question, and the jury appear to have been fully informed upon the subject. In any event, we do not think the cause should be reversed by reason of the admission of the testimony complained of.

We have examined this case with care and have discovered no reversible error in the record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

MARGIE A. LAIRD *et al.* Appellants, *vs.* SARAH L. DICKIRSON, Appellee.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*abstract of record must disclose everything upon which error is assigned.* A party bringing a case to the Supreme Court for review must prepare and file a complete abstract of the record in accordance with the rules of such court, in which everything upon which error is assigned must appear.

2. SAME—*judgment of circuit court is presumed to be correct.* The judgment of the circuit court is presumed to be correct until the contrary is shown, and on the question whether any plea and demurrer were, in fact, filed, a judgment overruling a demurrer to a plea, as shown by the transcript of the record, must be taken to be correct on appeal.

3. SAME—*when judgment of Appellate Court must be affirmed.* A judgment of the Appellate Court affirming a judgment of the circuit court must be affirmed by the Supreme Court where the abstract of record is so insufficient that the Supreme Court can not determine the ground of the decision of the circuit court or review the judgment of the Appellate Court.

4. CONSERVATORS—*county court cannot appoint conservator for non-resident.* Under chapter 86 of the Revised Statutes, relating to lunatics, idiots, drunkards or spendthrifts, the county court has no jurisdiction to appoint a conservator for a person who is not a resident of the county where the proceeding is instituted.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Lawrence county; the Hon. J. R. CREIGHTON, Judge, presiding.

P. G. BRADBURY, and GEORGE W. LACKEY, for appellants,

GEE & BARNES, and J. E. MCGAUGHEY, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This case has been brought here by appeal from the Appellate Court for the Fourth District, and the abstract of the record filed by appellants shows the following proceedings: The appellants, sisters of appellee, Sarah L. Dickirson, filed their petition in the county court of Lawrence county on May 15, 1907, alleging that appellee was a distracted and feeble-minded person, who by reason of unsoundness of mind was incapable of managing and caring for her own estate and property; that she had real property described in the petition of the value of \$19,000 and personal property worth \$1000. The prayer was that the court would appoint John Litherland, or some other fit person, to be conservator of appellee. On May 28, 1907, a summons was issued, and returned with an endorsement that the appellee was not found in that county. On the same day an affidavit was filed that the appellee had gone out of this State so that process could not be served upon her, and that she was then at Bernie, Missouri. Notice was published and mailed in accordance with the provisions of

the Chancery act. The notice recited that an affidavit had been filed that appellee was a non-resident of the State, and the notice was directed to her as such non-resident but the abstract does not contain any affidavit of that kind. The abstract does not show that anything further was done in the county court or what the judgment of that court was, if there was any, but the abstract indicates an appeal to the circuit court, and the notice to appellee is followed by an index in this form:

"14 Answer of Sarah L. Dickirson to petition filed in said cause.

"16 Copy of affidavit of James Dickirson, Jr.

"18 Copy of affidavit of Harriet W. Perkins.

"20 Copy of affidavit of Thomas Perkins.

Copy of affidavit of G. W. Dickirson.

"22 Copy of affidavit of Margie A. Laird, William P. Laird and Jonathan Litherland.

"26 Copy of motion made by Sarah L. Dickirson in the October term, 1907, of the circuit court to dismiss appeal."

In like manner the further proceedings in the circuit court are indexed, followed by a judgment entered at the May term, 1908, of the circuit court, which recites that the attorneys for appellee entered her special appearance for the purpose of pleading to the jurisdiction of the court, which said plea was placed on file and was before the court, and the appellants by their counsel filed a demurrer to said plea, which demurrer was overruled by the court, to which ruling appellants by their counsel excepted and elected to stand by their demurrer, and the court thereupon gave judgment in favor of appellee and against appellants upon the said plea and adjudged the costs against appellants. The abstract contains no plea or demurrer thereto, and counsel for the appellants contradict the record by saying that no plea or demurrer was ever filed. On that question we must take the judgment of the court as appearing in the transcript of the record to be correct. The abstract notes a certificate

of the presiding judge to a bill of exceptions, but it contains no bill of exceptions.

The judgment of the circuit court is presumed to be correct until the contrary is shown, and a party bringing a case to this court for review must prepare and file a complete abstract of the record in accordance with the rules of the court, in which everything upon which error is assigned must appear. (*Gibler v. City of Mattoon*, 167 Ill. 18.) Chapter 86 of the Revised Statutes, under which the proceeding was instituted, authorizes the county court of the county wherein any person resides who is alleged to be distracted or feeble-minded, who by reason of unsoundness of mind is incapable of managing and caring for his own estate, to proceed, on proper application, to ascertain the fact, and if the fact alleged exists the court may appoint a conservator. If the appellee was not a resident of Lawrence county the court had no jurisdiction, and for aught that appears by the abstract such was the fact. There appears to have been an answer filed by appellee, but the abstract does not indicate what it was nor show what the plea to the jurisdiction contained. The abstract does not show appellee's motion to dismiss or the affidavits heard on the same, but inasmuch as the judgment of the court was on the demurrer to the plea it may have been unnecessary to show the motion and evidence by the abstract. Viewed in any light, the abstract is so insufficient that we are unable to determine the ground of the decision by the circuit court or to review the judgment of the Appellate Court affirming the judgment of the circuit court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE SUPREME LODGE KNIGHTS OF PYTHIAS, Defendant in Error, vs. JOHN A. HINSEY *et al.*—(ERASTUS SIPPERLY and ARROLYN M. BROOKS, Plaintiffs in Error.)

Opinion filed October 26, 1909.

1. FRAUD—*a defrauded party is bound by his election of remedies.* One who has been defrauded by the use of his funds for the unauthorized purchase of property may insist upon taking the property or he may disclaim title and seek other remedies, but he can not insist upon inconsistent or repugnant rights, and if he once makes an election of remedies he is bound by it.

2. SAME—*knowledge of facts is essential to election of remedies.* It is necessary to constitute an election of remedies by a defrauded party that he shall have knowledge of the material facts, and if a suit is instituted by him without such knowledge it does not constitute such election.

3. SAME—*what is not such fraud by complainant as precludes relief in equity.* The failure of the complainant in a chancery proceeding for relief against the defendants who had fraudulently used the complainant's funds to invest in lands, to aver in the amended bill that the complainant, by its solicitor, had procured a conveyance from one of the defendants for part of the lands, does not amount to fraud by the complainant which bars relief in equity.

4. JUDICIAL SALES—*when party cannot complain that land was sold without right of redemption.* A defendant to a proceeding to enforce a lien against land on account of the fraud of such defendant and others, and who has never had any legal or equitable title to the property, which was ordered sold not as his property for the satisfaction of a debt against him, but as property fraudulently purchased with the money of the complainant and as a means of recovering such money, cannot complain that the property was sold without a right of redemption.

5. SAME—*when a decree against a bona fide purchaser is not wrongful.* A decree in a proceeding against persons who had fraudulently used complainant's money to buy land is not wrongful as to a bona fide purchaser from such persons, where its only effect, as to such purchaser, is to require her to carry out her contract at the suit of the complainant, whose money paid for the property which she purchased.

6. ACCOUNTING—*when it is not error to fail to credit amount of checks.* Failure of the court, in stating an account, to credit the amount of certain checks by the defendant to the complainant

is not error, where the checks were given before the execution of certain trust deeds which fixed the amount of the then existing indebtedness, and where the defendant does not show that the checks were given on account of the transaction involved and not on account of other transactions the parties had had.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding.

ROBERT R. BALDWIN, for plaintiffs in error.

CARLOS S. HARDY, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

During the transactions in question in this case and hereinafter recited, John A. Hinsey was president and Henry B. Stolte was secretary of the board of control of defendant in error, the Supreme Lodge Knights of Pythias, a corporation organized under an act of Congress of the United States for fraternal and benevolent purposes and forbidden to engage in any business for gain. The board of control had the management of the funds of the insurance department conducted by the corporation under the name of the "Endowment Rank," with authority to hold and disburse the fund, and, when the amount in the fund would justify such action, to direct the investment, or part of it, in readily convertible securities. On April 4, 1895, Hinsey and Stolte, as president and secretary of the board, drew a warrant on the First National Bank of Chicago, depository of the fund, for \$8000, payable to the order of Erastus Sipperly, one of the plaintiffs in error, and Sipperly drew that amount from the bank. With the money thus secured Sipperly purchased from the Illinois Trust and Savings Bank a certificate of sale executed by Thomas Tay-

lor, master in chancery of the circuit court of Cook county, dated December 27, 1894. The certificate was assigned by the bank to the board of control in consideration of \$7352.25, and the rest of the money was expended in redemption from tax sales and in depositing with the master an amount to cover taxes that would become due before the period of redemption would expire. No obligation to re-pay the money was given by anyone. Soon afterward Sipperly applied to William Garnett, owner of the equity of redemption, and purchased the same for \$900, taking a quit-claim deed to Wallace D. Millard, a person without property or means, an employee of the Chicago, Milwaukee and St. Paul Railroad Company under Hinsey, who was general claim agent of that company. The deed to Millard was made October 31, 1895, and the consideration of \$900 was paid out of the proceeds of a warrant for \$1000 drawn by Hinsey and Stolte, as president and secretary of the board of control, on the First National Bank. Millard executed a declaration of trust dated October 30, 1895, in which he declared that the conveyance to him by Garnett of the equity of redemption was made and was then held by him in trust for the use and benefit of Hinsey, Stolte and Sipperly, and that he had no interest therein. On November 11, 1895, Hinsey and Stolte, as president and secretary, assigned the master's certificate, in the name of the board of control, to Millard, who surrendered it to the master on March 28, 1896, and received a deed of the property. An entry was made on the investment journal of the endowment rank indicating a loan of \$8000 on a certificate of redemption, together with certificates of tax sales, special assessments and certificates of deposit for redemption, describing the property in question. Three days after the master's deed to Millard he quit-claimed the property on April 1, 1896, for no consideration of any kind, to Elmer L. Parker, a claim agent of the railroad company working under Hinsey, and on April 6, 1896, Parker made a trust

deed to Charles T. Allyn as trustee, with Stolte as successor in trust, purporting to secure the defendant in error in the sum of \$9000, with six per cent interest, conveying a part of the premises bought with its money and described in the master's deed, but leaving out a strip of land 60 feet wide and 1906.87 feet long, extending north and south along an alley, and divided into three lots. Parker was not only worthless from a financial standpoint, but he did not expect to pay the notes and it was not understood that he would do so. The notes and trust deed were accepted by Hinsey and Stolte for the board of control in place of the \$8000 and \$1000 taken from the funds and appropriated by Hinsey, Stolte and Sipperly, and an entry was made on the investment journal of the supposed loan to Parker. On April 24, 1896, the board of control at a meeting, in ignorance of the facts, approved the pretended loan. Sipperly negotiated with Charles F. Swigart for another piece of property, and on April 11, 1896, Hinsey and Stolte, as president and secretary, drew a warrant on the bank for \$10,000 in favor of F. R. Baldwin, a clerk in the employ of Sipperly, and Baldwin endorsed the warrant and delivered it to Sipperly. Baldwin was used as Millard and Parker were,—merely as a dummy. Sipperly paid \$8500 out of the \$10,000 for the land and used the remainder in payment of taxes and other charges thereon. The property was conveyed to Parker and he executed a declaration of trust on April 25, 1896, declaring that he held all the property conveyed to him, in trust for Hinsey, Stolte and Sipperly. Parker laid out the tract of land last purchased, with that which had been omitted from the first trust deed, into a subdivision named "Erastus Sipperly's subdivision," divided into four blocks and containing eighty lots. May 25, 1896, Parker executed a second trust deed to Charles T. Allyn as trustee, with Stolte as successor in trust, to secure the \$10,000 used in buying the last piece of property, conveying fifty of the lots and omitting thirty, the title of which re-

mained in Parker. After the execution of that trust deed Parker conveyed the thirty lots omitted to Stolte, who conveyed ten of the lots at the direction of Sipperly and held the remaining twenty for himself and Hinsey. A minute of the supposed \$10,000 loan was entered on the investment journal of the defendant in error. The property was all bought with funds of the endowment rank, and by their manipulation, Hinsey, the president, Stolte, the secretary, and Sipperly, their confederate, appropriated thirty lots to their own use without paying a dollar for them. On November 25, 1895, Millard had given Sipperly written authority to sell lots in the first purchase and to make contracts with purchasers, and on June 1, 1896, Parker gave Sipperly similar authority with reference to the lots included in the two trust deeds. A number of lots were sold to innocent purchasers in ignorance of the nature of the transactions or the rights of the defendant in error. The board of control, aside from the two officers, was in ignorance of the facts, but upon learning the same a bill was filed in the name of the defendant in error, against Hinsey, Sipperly, Stolte, Parker and others, asking to have the various conveyances set aside as against the complainant, except as to property which had been sold to *bona fide* purchasers without notice, and for a money decree against the principal defendants guilty of the alleged frauds, for such sums as they had received by reason of conveyances to innocent purchasers. The bill was afterward twice amended, and the amended bill, upon which the cause was heard, stated the facts in substance as above and prayed that an accounting might be taken of the moneys withdrawn from the fund; that the defendants who were liable to the complainant be required to pay the amount due the complainant, and in default thereof the premises be sold either under the deeds of trust or otherwise, as the court might determine, to satisfy the amounts so found due and costs; that the sale be without redemption except as to portions sold

to innocent purchasers and that the complainant have a decree for any deficiency. Arrollyn M. Brooks, one of the plaintiffs in error, was a purchaser of three lots in consideration of \$1350, of which \$25 was paid in cash and the balance was represented by her notes. By her answer she set out her contract and the *bona fide* character of her purchase. The answers of Hinsey, Parker and Sipperly denied the alleged fraud and averred that all the transactions were *bona fide*, with the knowledge of the board of control, and that the moneys taken from the fund were loaned. The cause was referred to a master in chancery and was heard on exceptions to his report. On March 22, 1902, after the bill was filed, Stolte, who has since died, conveyed for the use of the complainant seventeen lots of which he still held the title. During the hearing counsel for complainant produced in the court the notes of Mrs. Brooks which had been delivered to him by Stolte, disclaimed any interest in the same and offered to surrender them to the proper owner. The court entered a decree finding the amount due from Hinsey, Sipperly and the administratrix of Stolte, and ordered that if the same, with interest at five per cent and costs, should not be paid within ninety days, the real estate not previously disposed of to innocent purchasers for value should be sold without the right of redemption, and that for any deficiency a decree should be entered against said defendants and that the trust deeds and the notes secured thereby should be canceled, satisfied and released. Hinsey, Sipperly and Mrs. Brooks sued out a writ of error from the Appellate Court for the First District to review the decree and Parker appealed from it to the same court. The appeal was consolidated with the writ of error. The other parties whose names had been used as plaintiffs in error in suing out the writ were severed and the writ was prosecuted by those who sued it out. The Appellate Court affirmed the decree, and the writ of error in this case was sued out from this court to review the judgment

of the Appellate Court. Hinsey and Parker refused to assign errors on the record of the Appellate Court, stating that after judgment of the Appellate Court an agreement was entered into by which they quit-claimed all interest in the property in controversy to defendant in error, so that they had no legal or equitable interest in the subject matter of the suit. They were severed on the motion of Sipperly and Mrs. Brooks, who alone prosecute the writ of error in this court.

The above recital of the facts is all that is required to show that fraud was committed by Hinsey, Stolte and Sipperly by abstracting funds from the insurance department of the complainant for the purpose of investment for their own benefit and falsely making the transactions appear as loans. There is no further controversy on that subject in this court, but Sipperly alleges several reasons for a reversal of the judgment of the Appellate Court, the first of which is that the complainant, by filing the original bill, sought to recover the property, and was thereby estopped from obtaining a decree against him for its money invested in the property. It is doubtless true that one who has been defrauded by the use of his funds for the unauthorized purchase of property may insist upon taking the property if he regards that course for his benefit, or he may disclaim title and seek other remedies. He may proceed against the property substituted for the fund but cannot insist upon inconsistent or repugnant rights, and if he has once made an election he will be bound by it. (2 Story's Eq. sec. 126; *Anderson v. Chicago Trust and Savings Bank*, 195 Ill. 341.) He may follow the money into the land as a trust estate; (*Rice v. Rice*, 108 Ill. 199; *First Nat. Bank v. Leech*, 207 id. 215; *Verble v. Dillow*, 218 id. 537;) and in the latter case a decree was affirmed which ordered the money paid or the land sold and the proceeds applied to the payment of the amount due. It is necessary, however, to an election of remedies that the party defrauded should have

knowledge of the material facts. (*Garrett v. Farwell Co.* 199 Ill. 436.) If a suit is instituted without such knowledge it will not constitute an election of remedies. In *Anderson v. Chicago Trust and Savings Bank, supra*, the bill set up all the material facts and sought to have the shares of stock delivered to the complainant, and by that means the stock was tied up for two years until it was found to be worthless, when it would have been inequitable to permit the complainant, by amendment, to rescind the sale and seek an inconsistent remedy. The purpose of a court of equity is to make a defrauded party whole, and if such a party were compelled to choose between affirmance of a fraudulent conversion of his money into land or a personal judgment against the trustee, it might often result that a part of the fund would be lost. The property might not be sufficient to reimburse the party for his loss and the personal responsibility of his trustee might not extend to the full amount taken. In this case the complainant by the original bill did not affirm the transactions but asked the court to set aside the assignment to Millard and all the subsequent deeds and trust deeds, to authorize the master in chancery to convey the property to complainant except so far as other parties had acquired good title to portions of the land, and that the defendants who were parties to the fraud should be decreed to pay such sums as might be found due complainant by reason of their fraudulent acts, and such additional sums as the court might find due by reason of conveyances to innocent purchasers. That prayer was for a decree against the parties guilty of the fraud for the loss to the complainant after deducting the value of the property. The petition for the amendment of the original bill set out that since it was filed the complainant had learned that all the property not included in the two trust deeds had, prior to the filing of the original bill, passed into the hands of innocent purchasers, and it set out the fact of a large number of persons claiming some interest in the prop-

erty. The prayer was changed so as to ask for an accounting, a lien against the land into which the complainant's money went and a personal decree for any deficiency. Under the facts we hold that the complainant was not estopped by the allegations of the original bill.

It is next contended that the complainant did not come into a court of chancery with clean hands. The particular thing pointed out is the failure to allege in the last amended bill that the complainant had previously procured Stolte to deed to its solicitor, for its benefit, the seventeen lots of which he held title, which does not show the complainant guilty of any fraud or wrong which would prevent relief in equity.

The next proposition of Sipperly is, that it was error to decree that the property be sold without a right of redemption. The sale was not to be for any debt or obligation of Sipperly in the statutory sense or any proper sense. It was for the enforcement of a lien on account of the fraud and wrongful conduct of Sipperly and others. Sipperly never promised to pay anything, but procured the notes and trust deeds to be made by a dummy, and he never had any legal or equitable title to the property. It was ordered sold, not as his property for the satisfaction of a debt against him, but as property purchased with the money of the complainant and as a means of recovering such money.

It is next argued that the court erred in not finding the transactions to be usurious. Counsel does not make it clear on what ground he claims there was usury and we are unable to discover any basis for such a claim. The notes secured by the trust deeds drew six per cent interest, and there is an intimation that if the property was held for the use of the complainant in addition to the interest reserved, it would amount to more than legal interest. If that is the position of counsel it is not worthy of comment.

Complaint is made as to the action of the court in relation to items of account, and it is alleged as error that the

court did not find the value of the seventeen lots¹ deeded by Stolte for the use of complainant and credit the defendants with their value of the date of the deed. Stolte had mortgaged the lots to secure ten promissory notes for \$200 each, and the complainant refused to accept the lots with an assumption of the mortgage debt. We find no evidence of any value of the lots above the encumbrance and it does not appear that they were considered of sufficient value to justify their redemption. Counsel does not point out any evidence showing value above the encumbrance which ought to have been credited on the account.

It is also claimed to be error not to have allowed the amounts of three checks given by Sipperly to the complainant in 1895, before the execution of the trust deeds. There were two other real estate deals of a similar nature relating to other property, and it does not appear that the checks were given on account of these transactions and not on account of one of the others. The burden was on the defendants to prove payment, but at any rate the checks were given before the trust deeds, which fixed the amount of the then existing indebtedness, and the court did not err in failing to credit them.

Complaint is made of the failure to allow some other items, but the complaints are clearly groundless and do not require notice in detail.

Arrolyn M. Brooks claims that she has been wronged in some way, but all that was required of her was to carry out her contract at the suit of the party whose money paid for the property which she got. Her counsel says that the court erred in decreeing a sale of her property at the instance of a complainant not shown to be the owner of her notes, but the notes were brought into court by the solicitor for the complainant to be surrendered, and she was fully protected.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOHN BOLIK, Plaintiff in Error.

Opinion filed October 26, 1909.

1. CRIMINAL LAW—*party not entitled to instruction unless it is in proper form.* The right of a defendant to an instruction with reference to his defense of *alibi* is the right to an instruction in proper form, and he is not entitled to one which calls attention to the evidence of the *alibi* alone.

2. SAME—*the jury must consider whole evidence and not that touching an alibi alone.* It is the duty of the jury in a criminal case to consider all the evidence, including the criminating evidence as well as the evidence on the defense of *alibi*, as it is a reasonable doubt on the whole evidence, and not as to a particular fact, which will authorize acquittal.

3. RAPE—*when a judgment of conviction will be reversed.* A judgment of conviction for rape will be reversed by the Supreme Court where the only evidence for the People is that of the complaining witness, which is flatly contradicted by the defendant and other witnesses, and which is so unreasonable and inconsistent as to raise a grave doubt of the defendant's guilt and to lead to the conclusion that the verdict was the result of passion or prejudice on the part of the jury.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. WILLIAM H. MCSURELY, Judge, presiding.

A. J. BEDARD, and SAMUEL SPITZER, for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (JUNE C. SMITH, and JOHN T. FLEMING, of counsel,) for the People.

Per CURIAM: The plaintiff in error was convicted in the criminal court of Cook county of rape and sentenced to the penitentiary for two years.

The complaining witness, Mamie Hanson, a girl fifteen years old, testified that she was a stenographer employed by plaintiff in error at his paint store, 2007 North Halsted

street, Chicago, Illinois, the last two weeks of December, 1908; that thereafter, on January 9, 1909, she asked the plaintiff in error, over the telephone, for employment, and was told that he had some contracts to write; that she thereupon called at his place of business about 5:00 o'clock P. M. on that date and worked for him an hour, and also the next day and the following Monday, January 11, the date on which the assault is alleged to have been committed; that some time between 5:00 and 5:30 P. M. plaintiff in error called her to the back of the store and ravished her against her will and despite her resistance. On cross-examination she stated that she made no outcry; that the assault lasted about two minutes; that persons might have come in the store while they were in the back but that she saw no one when she returned from the rear; that after the assault plaintiff in error unlocked the front door; that she then went away and met one William C. Churchill on a corner near plaintiff in error's store and was with him until about 8:00 o'clock P. M., and that she told him what had occurred. She was brought into the North Avenue police station from a friend's house some three weeks after the alleged assault. Up to that time she did not tell anyone, except Churchill, about what had transpired. She admitted that she had made a complaint and testified before the grand jury against Churchill.

Plaintiff in error testified that he was thirty years of age, married, and was a painting contractor. He denied having committed the assault or having had sexual intercourse with the complaining witness on the date charged or at any other time, claiming that on the day in question he was attending a sick horse and did not reach his store until between 6:00 and 7:00 o'clock P. M., when he found several of his workmen waiting for him. One of these workmen testified that on January 11, 1909, he, with several other workmen, reached plaintiff in error's store from a job about 5:00 or 5:15 P. M. and saw the complaining

witness at her desk, dressed for the street; that she stated that Bolik, before going away early in the day, asked her to remain until the workmen arrived; that she then went away, leaving him and the other workmen waiting for Bolik, who arrived about 6:00 o'clock. Dr. E. L. Quitman, a veterinary surgeon, testified that he was with plaintiff in error on said date between 4:30 and 5:30 P. M. attending a sick horse belonging to plaintiff in error, at 733 Wells street, which is about three miles from said paint store. Several neighbors and associates testified that plaintiff in error's general reputation for chastity was good. The abstract is in narrative form, and the foregoing is the substance of all the testimony preserved in the record.

Plaintiff in error contends that the evidence does not support the verdict. The only testimony for the State was that of the complaining witness, and is in absolute conflict with the testimony of plaintiff in error and two other witnesses. Her testimony is apparently unreasonable in several particulars. She admitted that she made no outcry, and that persons may have come into the store during the time of the alleged attack. She stated that immediately thereafter plaintiff in error unlocked the front door. She made no complaint against the plaintiff in error until three weeks later, after she was brought to the North Avenue police station, and told no one about it until that time, except the young man she was with that evening and against whom she later made a complaint, apparently of the same character as this charge, although the record does not show clearly what the complaint was. As we said in *Rucker v. People*, 224 Ill. 131, in discussing the conduct of the complaining witness in a case of a very similar nature: "Her conduct was wholly inconsistent with the acts of a girl entirely innocent and upon whom a dastardly outrage had been committed."

While this court is committed to the fullest extent to the doctrine that the jury are the judges of the facts and

the weight of the evidence in all criminal cases, yet it is the duty of this court to carefully review the evidence, and where we believe the conviction is based upon unsatisfactory evidence, or where, after a patient consideration of the evidence, there remains such grave and serious doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice or passion and not of that calm and deliberate consideration of the evidence which the law requires, then we should so find. (*Keller v. People*, 204 Ill. 604; *Dahlberg v. People*, 225 id. 485.) We do not think the evidence in this record was sufficient to justify the conviction for the crime alleged.

The further complaint is made that the court erred in refusing to give two instructions for plaintiff in error with reference to the defense of *alibi*. Counsel for plaintiff in error insist that one of these instructions should have been given on the authority of *State v. Taylor*, 118 Mo. 153, and *Burns v. State*, 75 Ohio St. 407, where instructions very similar were approved by those courts. Counsel for defendant in error, on the other hand, insist that this instruction is not exactly like the instructions approved in those decisions, and, as we understand their argument, insist that the instructions in those cases are wrong. Without passing on the correctness of the instructions in those cases or their similarity to the one here in question, we deem it sufficient to say that both the instructions refused are subject to the criticism that they only call attention to the evidence on *alibi*, when the correct rule is, as has frequently been held by this court, that it is the duty of the jury to consider all the evidence, as well that touching the question of *alibi* as the criminating evidence introduced by the prosecution; that the reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to a particular fact in the case. (*Mullins v. People*, 110 Ill. 42; *Hornish v. People*, 142 id. 620.) While the defense of *alibi* was raised by plaintiff in error,

he was not entitled to have an instruction given with reference thereto unless he presented such an instruction in proper form.

The judgment of the criminal court will be reversed and the cause remanded.

Reversed and remanded.

JOSEPH P. WULLER, Appellee, vs. THE CHUSE GROCERY COMPANY, Appellant.

Opinion filed October 26, 1909.

1. INFANTS—*contract of infant is voidable though he is in business.* The contract of an infant is, in general, voidable by him, and it gains no additional force from the fact that he is engaged in business for himself or is emancipated.

2. SAME—*right of an infant to disaffirm contract exists for his protection.* The exercise by an infant of his right to disaffirm his contract may operate injuriously upon the other party, but the right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion.

3. SAME—*fact that infant's contract is executed does not preclude disaffirmance.* The fact that the contract of an infant has been executed does not preclude its disaffirmance by him, as there is no distinction in that respect between executed and executory contracts. (*Chicago Mutual Life Indemnity Ass. v. Hunt*, 127 Ill. 257, explained.)

4. SAME—*voluntary payments may be recovered by an infant—rule as to returning consideration.* Voluntary payments made by an infant under his contract may be recovered when he disaffirms the contract, and while he must return such part of the consideration as remains in his possession, yet if he has lost or expended it it need not be restored.

5. SAME—*when contract may be avoided either after or during minority.* Contracts concerning personal property and executory agreements may be avoided by an infant either after or during his minority.

6. SAME—*infant may disaffirm purchase of capital stock and recover purchase money.* Shares of stock in a corporation are personal property, and a purchase of such stock by an infant from the corporation may be disaffirmed by him during minority or after, and he may return the stock and recover the purchase money.

7. SAME—*cancellation of stock certificate is restoration.* In a proceeding by an infant against a corporation to repudiate his purchase of stock and recover the purchase money, a provision of the decree that the certificate of stock be canceled amounts to surrender of the stock by the infant and restoration to the corporation.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. B. R. BURROUGHS, Judge, presiding.

L. D. TURNER, and L. D. TURNER, JR., for appellant.

DILL & PFINGSTEN, and SCHAEFER, FARMER & KRUGER, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The appellee filed a bill for relief against the appellant, and the circuit court decreed the payment of \$1500 by the appellant to the appellee and the cancellation of a certificate for fifteen shares of the capital stock of appellant held by the appellee. This decree having been affirmed by the Appellate Court, an appeal is prosecuted to reverse the judgment of the latter court.

The appellee was a minor when the bill was filed and when the cause was heard. In May, 1905, the appellant corporation was organized to carry on a mercantile business with a capital stock of \$4500, of which the appellee subscribed and paid for fifteen shares of \$100 each. He acted as secretary and treasurer of the corporation, and was a salesman and book-keeper thereof at \$12 a week during the first year and at \$15 a week thereafter until after he began this suit, in December, 1908. Having become dissatisfied with the conduct of the business, appellee filed a bill charging mismanagement thereof, repudiating, on account of his minority, his contract for said stock and refusing to be bound thereby, offering to return the certificate

for said stock, and praying for an accounting, the appointment of a receiver and general relief.

The position of the appellant is, that an infant, having advanced money upon a contract voidable because of his infancy, cannot rescind the contract and recover the money, and that he cannot elect to avoid the contract during his infancy. The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated. The exercise of his right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned.

The appellant has cited the case of *Chicago Mutual Life Indemnity Ass. v. Hunt*, 127 Ill. 257, in which the court, in determining the right of the association to admit minors to membership, used the following language (p. 277): "If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all. We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. 'If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained by fraud.'—1 Parsons on Contracts, 332."

This language of the court used in argument was not essential to the decision and the quotation from Parsons is at variance with authority and the doctrine now accepted.

If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and cheats. Such voluntary payment may be recovered upon the avoidance of the contract. (*Shurtleff v. Millard*, 12 R. I. 272; *Robinson v. Weeks*, 56 Me. 102; *Ruchisky v. DeHaven*, 97 Pa. St. 202.) The consideration, or such part of it as remains in the possession or control of the minor, must be returned, but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution. (*Craig v. VanBebber*, 100 Mo. 584; *Reynolds v. McCurry*, 100 Ill. 356.) Contracts concerning personal property and executory agreements may be avoided by the infant either during or after his minority. (*Childs v. Dobbins*, 55 Iowa, 205; *Chapin v. Shafer*, 49 N. Y. 407; *Robinson v. Weeks*, *supra*.) The shares of capital stock of a corporation are personal property, the same as promissory notes or bonds. (*Cooper v. Corbin*, 105 Ill. 224.) An infant's purchase of such stock is voidable, and he may, at his election, avoid it and recover the purchase money. (*Indianapolis Chair Manf. Co. v. Wilcox*, 59 Ind. 429; *White v. New Bedford Cotton-Waste Corporation*, 178 Mass. 20.) The appellee having offered to return the stock which he had received under the contract, was entitled to the return of the purchase money he had paid.

The certificate of stock held by the appellee was merely the evidence of his rights as a stockholder. The contract by which he became a stockholder having been avoided, the decree properly provided for the cancellation of the certificate, which amounted, in effect, to the surrender of the stock by appellee and its restoration to appellant.

The judgment is affirmed.

Judgment affirmed.

MYRTLE ALDRICH, Admx., Appellee, vs. THE ILLINOIS
CENTRAL RAILROAD COMPANY, Appellant.

Opinion filed October 26, 1909.

1. FELLOW-SERVANTS—*co-operation must be in particular employment.* To make servants of the same master fellow-servants under the first branch of the fellow-servant rule, relating to co-operation, it is necessary that the servants, at the time of the injury, be co-operating with each other in a particular work, and it is not enough that they are servants of the same master and are co-operating in the general business.

2. SAME—*whether relation of fellow-servants exists is a mixed question of law and fact.* The definition of "fellow-servants" is for the court, but whether certain employees of a common master fall within that definition is a question of fact, and hence the question whether the relation exists in a particular case is a mixed question of law and fact.

3. SAME—*condition under which the relation of fellow-servants becomes a question of law.* The question whether the relation of fellow-servants exists becomes one of law only when there is no dispute with reference to the facts and when the evidence and all the legitimate conclusions to be drawn therefrom are such that all reasonable men will agree to the existence of such relation.

4. SAME—*freight crews in same "chain gang" are not necessarily fellow-servants.* Members of a freight crew are not necessarily and as a matter of law fellow-servants of the members of another freight crew, even though both crews belong to the same "chain gang" on the same division of a railroad and are engaged in moving freight on such division over a double track railroad; and this is true though there is some evidence tending to show that the duties of the crews brought them into habitual association.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Marion county; the Hon. ALBERT M. ROSE, Judge, presiding.

W. W. BARR, and CHARLES E. FEIRICH, (W. S. KENYON, of counsel,) for appellant.

NOLEMAN & SMITH, and W. F. BUNDY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court :

This is an action on the case in the circuit court of Marion county by appellee, against appellant, to recover for the death of appellee's intestate from an injury received while in the service of appellant as a brakeman. There was a trial by jury and judgment in favor of the appellee for \$8000. On appeal to the Appellate Court this judgment was affirmed, and a further appeal has been taken to this court.

Appellant has a double track from Centralia to Mounds, in this State, the south-bound trains having superior rights over the west track and the north-bound over the east track. In accordance with the rules of the appellant no north-bound train has any right to be on the west or south-bound track unless protected by sending out a flagman to warn any train approaching from the north. On October 23, 1907, the freight train on which the decedent was employed as brakeman left Centralia over the south-bound track, and had reached a point about a half mile south of Elkhville and about a mile north of Hallidayboro when a collision occurred, which caused the death of the decedent. Some little time before this, another freight train of appellant had arrived from the south at Hallidayboro station and was engaged in what is called "pulling the mine." At Hallidayboro there are two main tracks and a passing track between them. The freight train going north stopped at Hallidayboro for the purpose of taking the coal cars from a switch track, and in order to do this the train was pulled in onto the passing track and left standing there while the engine was cut off, went to the north end of the passing track and backed down the west track to the mine. It there secured six cars, which were to be put on the front end of the train, and after making the necessary movements to get off the mine tracks and get the engine on the north end of the cars it was handling, the engine with these six cars moved north up the west main track to a point imme-

diately north of the north point of the switch, which leads off of the west main track at the north end of the passing track. Just as the engine and train of cars had started to back in off of the main track onto the north end of the passing track, the train on which decedent was employed came in sight and a head-on collision followed. It is conceded that it was then too late to stop the south-bound train and too late for the engine and six cars to get out of the way, and it is also conceded that it was the duty of the north-bound crew, under the circumstances, to send out a flagman a sufficient distance ahead to the north to warn trains and that this precaution was neglected. The train dispatcher of appellant was located at Carbondale. He had ordered the conductor of this north-bound train to "pull the mine," and knew that the engine and cars would have to be on the south-bound track in order to do the necessary switching there, but he failed to notify the crew of the train on which decedent was employed that the west or south-bound track at the Hallidayboro mine would be obstructed. This was not a meeting point or a customary passing point for these two trains and neither of the crews knew they would meet there. There was an electric signal block eight or ten car-lengths south of the north end of the passing track, which was constructed to work automatically. When there was a train or car south of this block the signal would show a red light to the north, so as to keep trains coming from the north warned, but as soon as a car or train passed out of this block to the north the light would show green. When the switch at the north end of the passing track was thrown to allow a train of cars to go in on the passing track the switch light would show red to the north. At the particular time of this accident, however, sufficient time had elapsed after the engine and cars got out of the electric block so that the semaphore light would not warn the oncoming train, and the switch light was not thrown in time to warn the crew of the ob-

struction. In fact, the trainmen on the south-bound train saw the headlight of the engine before they saw any other indication of obstruction on the track. The evidence tended to show that there was considerable smoke there, caused by a passenger train, which had just gone north. The decedent left his widow and four children, aged 9, 8, 4 and 1½, respectively. Twin children were born after his death, on April 10, 1908.

It is first urged by appellant, as a matter of law, that the members of the two train crews were fellow-servants; that both crews were in what the evidence denominates the "chain gang service," subject to call to handle any class of freight along the line of the road that the business might call for; that both crews at the time of the accident were engaged in the particular business in hand,—that is, the operation of the St. Louis division of appellant's road. We do not think, under the evidence in this case, that the crews of the two trains were fellow-servants. "To create that relation between servants they must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety." (*Indiana, Illinois and Iowa Railroad Co. v. Otstot*, 212 Ill. 429; *Duffy v. Kivilin*, 195 id. 630.) To make them fellow-servants under the first branch of the rule they must be directly co-operating with each other in a particular business and in a particular line of employment. It is not sufficient that they be employed by the same master. In order to bring them within the rule they must directly co-operate in a particular business as distinguished from indirectly co-operating in the general business of the master. (*Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324; *Chicago and Eastern Illinois Railroad Co. v. White*, 209 id. 124.) Manifestly, the two train crews were co-operating in the general business of

the master in the operation of the St. Louis division of appellant's railroad but not in any particular business. One train crew was moving freight north on the line of the defendant company and the other was moving freight south. At the time of the accident the train crew going north was taking out coal cars from the switch yards of the coal company, while the train going south had nothing to do with this particular business. If the contention of appellant on this point were to be upheld, then would it not necessarily follow that every person employed by the railroad company on this division of the road would be a fellow-servant with every other one, under the first branch of the rule? Such is not the law.

It is even more earnestly insisted by counsel that the members of the two train crews were fellow-servants under the second branch of the rule. The engineers and conductors of both these trains testified that they knew that north-bound trains frequently crossed the south-bound track at Hallidayboro to take cars from the mine switch tracks. There was no evidence to indicate that these train crews had ever passed at this point before or to show the extent of the association in the line of their work previous to this accident. Indeed, the only proof that tends to indicate in any manner any association was that the two train crews were engaged in hauling freight on the same division of a double track railroad. The definition of "fellow-servant" is for the court. Whether certain employees of a common master fall within the definition is a question of fact, hence whether or not the relation exists is a mixed question of law and fact. (*Indianapolis and St. Louis Railroad Co. v. Morgenstern*, 106 Ill. 216; *Hartley v. Chicago and Alton Railroad Co.* 197 id. 440.) Whether the relation of fellow-servant exists only becomes a question of law when there is no dispute with reference to the facts, and when the evidence, and all the legitimate conclusions to be drawn therefrom, are such that all reasonable men will agree to the

existence of the relation of fellow-servants. *Illinois Southern Railway Co. v. Marshall*, 210 Ill. 562; *Indiana, Illinois and Iowa Railroad Co. v. Otstot*, *supra*; *Chicago and Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330; *Illinois Steel Co. v. Coffey*, 205 id. 206; *Chicago City Railway Co. v. Leach*, 208 id. 198.

In the case of *Lake Erie and Western Railroad Co. v. Middleton*, 142 Ill. 550, an engine hostler was on an engine which was standing on the main track near the depot and by the negligence of the engineer and crew of an incoming train a collision occurred. In *Mobile and Ohio Railroad Co. v. Massey*, 152 Ill. 144, a construction train and a wild freight train collided because of the negligence of the conductor of the construction train. In *Chicago and Western Illinois Railroad Co. v. Flynn*, 154 Ill. 448, the engineer of a freight train was injured because of the negligence of the brakeman of another train in not closing a switch. In *Chicago and Alton Railroad Co. v. House*, 172 Ill. 601, the fireman on a passenger train was killed through the neglect of the brakeman of a freight train to close a switch. In *Chicago and Alton Railroad Co. v. Swan*, 176 Ill. 424, the baggageman on a passenger train was injured through the negligence of the engineer on the same train. And in all these cases it was held that the question whether the doctrine of fellow-servants applied was one of fact, to be submitted, under proper instructions, to the jury. To the same effect are *Hartley v. Chicago and Alton Railroad Co.* *supra*; *Chicago and Eastern Illinois Railroad Co. v. Kimmel*, 221 Ill. 547; *Donk Bros. Coal Co. v. Thil*, 228 id. 233; *Chicago, Rock Island and Pacific Railway Co. v. Strong*, id. 281; *Chicago Terminal Railroad Co. v. Reddick*, 230 id. 105; *Gathman v. City of Chicago*, 236 id. 9.

While the facts in this record which would tend to show the relation of the two train crews are not in dispute, even if it be conceded that some of this evidence may tend to prove that the duties of the two train crews brought

them into habitual association, that evidence "was not of such a nature that but one conclusion could have been drawn from it, and therefore the question was properly submitted to the jury." (*Chicago and Eastern Illinois Railroad Co. v. White, supra*, on p. 131.) We do not think anything is said in *Illinois Steel Co. v. Coffey, supra*, *Chicago City Railway Co. v. Leach, supra*, *Chicago and Alton Railway Co. v. Bell*, 209 Ill. 25, or *Crane Co. v. Hogan*, 228 id. 338, that would lead to a contrary conclusion. In these last cases the court was of the opinion that the undisputed facts were of such a nature that all reasonable minds must necessarily reach the conclusion that the persons in question were fellow-servants. Such is not the case here. The facts are not of such a nature as to show beyond question that the relation of fellow-servants existed between the two train crews.

Our conclusion on the question of fellow-servants renders it unnecessary for us to discuss at length the question raised in the briefs as to whether it was the duty of the train dispatcher of appellant to give the crew of the south-bound train notice of the fact that the other train crew was taking out coal cars from the Hallidayboro mine. We deem it sufficient to say on the facts in this case, under the rules of law laid down by this court in *Rogers v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 211 Ill. 126, that this was a question of fact to be determined by the jury.

No other questions have been raised in this court in the brief and argument of appellant. The questions of fact as to whether the members of the two train crews were fellow-servants and whether the south-bound crew should have been notified by appellant were properly submitted to the jury.

The judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

FREDERICK H. WACHSMUTH *et al.* Appellants, *vs.* THE PENN MUTUAL LIFE INSURANCE COMPANY *et al.* Appellees.

Opinion filed October 26, 1909.

1. EXECUTORS AND ADMINISTRATORS—*when debt of executor to estate must be treated as paid.* Where a debtor is appointed executor or administrator of his creditor's estate, and he has at the time of such appointment sufficient property to pay his debts, including the one to the estate, the law regards the debt to the estate as paid and the amount thereof as cash in the hands of such executor or administrator, notwithstanding he may subsequently become insolvent.

2. SAME—*when refusal to permit sale of land to pay debts is proper.* A petition by executors to sell land to pay debts of the estate should be denied where it appears that the alleged deficiency of assets is due to the failure of the executors, who were solvent at the time of their appointment, to charge themselves with the amount of their personal indebtedness to the estate and inventory the same as cash.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Probate Court of Cook county; the Hon. CHARLES S. CUTTING, Judge, presiding.

WILLIAM GARNETT, (MORAN, MAYER & MEYER, of counsel,) for appellants:

The executors in the case at bar were insolvent at the time of their appointment and continued to be down to the date of the hearing. *Best v. Fuller*, 185 Ill. 43; *Atwater v. Bank*, 152 id. 605; *Bank v. Walton*, 5 L. R. A. 765.

Where an executor is indebted to his testator and is insolvent and unable to pay his debt at the time of the death of the testator, and continues so to be, such debt from the executor will not be treated as assets in the hands of the executor. *In re Walker*, 125 Cal. 242; *McCarty v. Fraser*, 62 Mo. 263; *In re Georgi*, 47 N. Y. Sup. 1061; *In re Howell's Estate*, 61 L. R. A. 313; *Lyon v. Osgood*,

58 Vt. 707; *State v. Gregory*, 119 Ind. 503; *Condit v. Winslow*, 106 id. 142; *Wilson v. Ruthrauff*, 82 Mo. App. 435; 2 Woerner on Administration, secs. 311, 512.

ASHCRAFT & ASHCRAFT, and CHARLES L. BARTLETT,
(HARRISON B. RILEY, of counsel,) for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from the judgment of the Appellate Court for the First District affirming a decree of the probate court of Cook county which dismissed the petition of Frederick H. Wachsmuth and Louis C. Wachsmuth, executors of the last will and testament of Henry F. Wachsmuth, deceased, for leave to sell lands to pay debts. The executors have prosecuted a further appeal to this court.

Henry F. Wachsmuth died November 2, 1900, leaving a last will, by which he devised to each of his sons a piece of real estate in Chicago, and to both of them, share and share alike, a third piece of Chicago city property. His sons, who are his executors and appellants in this case, were his sole devisees. It does not appear that Henry F. Wachsmuth owned any other real estate than the three pieces above referred to. He left personal property to the amount of \$5595.08. The debts probated against his estate amounted to \$12,850.33, thus showing a deficiency of personal assets of \$7254.25. The petition to sell the real estate was based on a just and true account filed December 12, 1905, which showed the deficiency of personal assets as above stated. All of the real estate of which the testator died seized was encumbered by trust deeds or mortgages placed thereon by the testator. The liabilities of the estate under these encumbrances was \$35,500. One piece of property was sold under foreclosure and failed to bring the full amount of the encumbrance against it. The parcel of real estate known as the Forty-seventh street property, which was devised to Louis C. Wachsmuth, was mortgaged for

\$11,000. This indebtedness was paid with part of the proceeds of a \$15,000 trust deed placed on the property by Louis C. Wachsmuth after his father's death. This trust deed was executed to Francis B. Peabody, and finally, by assignment, became the property of the Penn Mutual Life Insurance Company, and was by that company foreclosed and the property sold for the amount of the debt and costs, and no redemption having been made, a deed was issued by the master in chancery to the Penn Mutual Life Insurance Company on October 26, 1904, and afterwards the insurance company conveyed the said property and the title thereto is now in Bernard Baumgarden. The encumbrance upon the other piece of property, which is known in the record as the Rhodes avenue property, was \$10,000, and this piece was devised to Frederick H. Wachsmuth by the will.

The ground upon which the probate court dismissed appellants' petition was, that it did not appear that there was any deficiency of personal assets to pay the debts of the estate. This holding is based upon the admitted facts that the executors were at the time of their appointment indebted to their father's estate, on account of money loaned to them by their father in his lifetime, in the sum of \$10,000, and that the property devised to appellants under the will was at a fair market value worth \$70,000, or \$34,500 more than the aggregate amount of encumbrances thereon.

The evidence shows that the appellants had property in their own right at the time they were appointed executors, valued at \$5000, and that their personal liabilities were \$27,000. Deducting the individual liabilities of the executors from the value of the equities devised to them, it appears that the executors were solvent and able to pay the \$10,000 indebtedness which they owed to their father's estate. Under these facts the probate court held that the debt due from appellants to the estate must be regarded as cash assets in the hands of the executors available for the payment of claims against the estate, and that so regarding

this amount, and adding it to the \$5595.08 of other personal assets belonging to the estate, the deficiency of personal assets disappears, hence there was no authority, under the law, for resorting to a sale of real estate to pay debts. The Appellate Court took the same view of this question that the probate court did and affirmed its decree.

The appellees have assigned cross-errors on the record which call in question the rulings of the court on other questions which were decided in favor of appellees, but in the view which we have of the question already stated it will not be necessary for us to either state the facts out of which they arose or decide the questions raised by the cross-errors assigned. The ultimate question to be determined is, should the \$10,000 debt due the estate from the executors be regarded as so much personal assets, which by operation of law is converted into cash in the hands of the executors? If this question is answered in the affirmative, it follows, as a necessary sequence, that there was no deficiency in the personal property and that the decree dismissing the petition is correct.

Appellees contend that when a debtor is appointed administrator of his creditor's estate the debt is considered paid and the administrator is chargeable with the amount thereof in the settlement of his accounts, regardless of the financial condition of the administrator. This contention is supported to the full extent claimed by appellees by the Supreme Court of Massachusetts in *Leland v. Felton*, 1 Allen, 531; by the Supreme Court of Ohio in *McGaughey v. Jacoby*, 54 Ohio St. 487; by the Supreme Court of New Hampshire in *Judge of Probate v. Sulloway*, 68 N. H. 511, and by the Supreme Court of Alabama in the case of *Wright v. Lang*, 66 Ala. 389. It will thus be seen that the rule contended for is not without support. The reason upon which these decisions rest is that the administrator cannot sue himself, and that therefore when he is appointed his debt to the estate is by a fiction of law regarded as collected and

paid to himself, as administrator. The rule laid down in the foregoing cases, which is known as the Massachusetts rule, has been modified by later cases in other States so as to permit the administrator to show that he was insolvent at the time of his appointment and so remained during the term of his office, and thus relieve himself from the consequences of failing to pay over money which he never, in fact, had and was wholly unable to obtain. The rule in its modified form is applied in the following cases: *In re Walker*, 125 Cal. 242; *Baucus v. Stover*, 89 N. Y. 1; *Baucus v. Barr*, 107 id. 624, affirming 45 Hun, 582; *McCarty v. Frazer*, 62 Mo. 263; *Parker v. Irick*, 10 N. J. Eq. 269; *Rader v. Yeargin*, 85 Tenn. 486; *McClamrock v. Gregory*, 119 Ind 503.

In the case last above cited the Supreme Court of Indiana uses the following language: "One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T. Miller, the administrator, during the period of his administration. The money collected by him while professing to act as the agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust, which he should have inventoried and charged himself with, and if by the use of due diligence all or any part of the claim could have been saved to the estate his sureties are therewith chargeable, but if he was hopelessly insolvent they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties." Further on in the opinion the court says: "The debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of administration in discharge of his official liability."

So far as we are advised this question has never been passed on by this court. It seems to us that the rule laid down in Massachusetts is liable to work a great hardship

upon administrators and the sureties upon their bonds. To compel sureties on administrators' bonds to augment the estate of the deceased by requiring them to pay a debt which an insolvent administrator happens to owe the estate is imposing upon them a burden not contemplated and in many cases a great hardship. Leaving out of view the rights of the sureties, it would seem equally shocking to our sense of justice to proceed against an administrator personally for a failure to pay over money which he, in fact, did not have and which he had no means of procuring. Where, however, the administrator is solvent, no such hardship can be imposed upon either the sureties or the administrator. The rule thus applied will accomplish the desired end in most cases and avoid the harsh consequences that would occasionally result from the application of the unrestricted Massachusetts rule.

Appellants, however, contend that, even under this view of the law, the decree of the county court is erroneous, because it is said that the administrators were not solvent at the time of their appointment and have not been at any time since. This contention presents a question of fact. As already shown, the real estate devised to appellants under the will of their father was worth \$34,500 over and above the encumbrances thereon. These valuations are fixed by a stipulation of the parties. After deducting all of the indebtedness chargeable against this real estate there is an excess sufficient to show that appellants were solvent at the time of their appointment as executors. If they were solvent at that time,—that is, if they had property sufficient to pay all of their personal liabilities, including the \$10,000 which they owed their father's estate,—they were properly chargeable with their debt to the estate and it should have been regarded as collected. It can make no difference, with the transmutation which the law effects in the legal status of this debt, that afterwards, through some cause, appellants became insolvent and finally unable to account for the

debt due the estate. The status of the debt having been fixed by their appointment as executors and their solvency at that time, cannot be changed by subsequent insolvency of the administrators. It was not only the duty of appellants to charge themselves with the \$10,000 which they owed the estate and inventory it as cash on hand, but in the eye of the law this was done. The debt was paid to the estate. In this view there was no deficiency of personal assets, and there was no error in dismissing appellants' petition.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Oscar Hebel *et al.* Appellants, *vs.*
F. D. MEACHAM *et al.* Appellees.

Opinion filed October 26, 1909.

1. TAXES—*tax-payer who has failed to file schedule may have assessment reviewed by board of review.* Paragraph 329 of the Revenue act, relating to the review of assessments by the board of review, includes the review by such board of an assessment of personal property made by the board of assessors, under paragraph 313 of such act, against a person who failed or refused to file a schedule, for which failure the board of assessors has added a fifty per cent penalty to the assessment made by it against such person.

2. SAME—*jurisdiction of board of review is revisory.* Where the board of review reviews an assessment of personal property made by the board of assessors its jurisdiction is revisory and not original in character, and while it may affirm the action of the board of assessors or raise or lower the assessment in such manner "as shall appear to be just" it has no arbitrary discretion, and has no power to relieve a tax-payer of the penalty imposed by the board of assessors for failure to file a schedule.

3. SAME—*rule where the board of review changes assessment carrying a penalty.* If the board of review raises or lowers an assessment of personal property made by the board of assessors which carries a fifty per cent penalty for failure of the tax-payer to file a schedule, it must add to the "fair cash value" of such property, as determined by it, fifty per cent of such value and extend the aggregate of these two amounts as the corrected assessment.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

JOHN C. RICHBERG, (RICHBERG & RICHBERG, of counsel,) for appellants:

It is the mandatory duty of the board of assessors to impose a fifty per cent penalty upon property owners who refuse to schedule their property. *Peirce v. Carlock*, 224 Ill. 608; Hurd's Stat. 1908, chap. 120, secs. 24, 313; *Siegfried v. Raymond*, 190 Ill. 424.

The board of review has only the powers specifically defined by statute, and no implied powers except such as are necessary. 27 Am. & Eng. Ency. of Law, (2d ed.) 711.

The board of review has been granted no specific power to impose or remit penalties or to revise penal valuations. Hurd's Stat. 1908, chap. 120, sec. 329; *Condit v. Widmayer*, 196 Ill. 623.

No implied power has been given the board of review to deal with penalties or penal valuations. Such implication would be contrary to public policy. *Peirce v. Carlock*, 224 Ill. 608; *Bartlett v. Wilson*, 59 Vt. 23; *State v. Apgar*, 31 N. J. L. 358; *Charleston v. County Comrs.* 101 Mass. 87; *Adler v. Whitbeck*, 44 Ohio St. 539.

The absence of a specific grant of power makes the lack of authority clear in a body of such limited jurisdiction as the board of review, hence the doctrine of acquiescence does not apply. *Whittemore v. People*, 227 Ill. 453.

HERBERT S. DUNCOMBE, and FRANK L. SHEPARD, for appellees:

The statute provides that the board of review may, upon the application of any tax-payer or upon its own motion, revise the entire assessment, or any part thereof, of any tax-payer, and correct the same as shall appear to it to be just. It shall assess all property not assessed by the assessors, and alter the descriptions of property when deemed

necessary. It provides that on complaint that any property is incorrectly assessed the board shall review the assessment and correct the same as shall appear to be just, and that it may increase, reduce or otherwise adjust the assessment of any individual or corporation on real property or personalty, making changes in the valuations thereof as may be just, and shall have full power over the assessment of any individual or corporation, and may do anything in regard thereto that it may deem necessary to make a just assessment. These provisions not only empower the board of review to act in these cases, but make it the mandatory duty of the board to do so. *Hurd's Stat.* 1908, chap. 120, secs. 33-35; *Beidler v. Kochersperger*, 171 Ill. 563; *Kinley Manf. Co. v. Kochersperger*, 174 id. 379; *Kochersperger v. Larned*, 172 id. 86; *Clock Co. v. Kochersperger*, 175 id. 383; *Felsenthal v. Johnson*, 104 id. 21; *Loewenthal v. People*, 192 id. 222; 2 *Cooley on Taxation*, (3d ed.) 1359.

The board of assessors is not bound by the schedule filed by the tax-payer but may assess additional property to such tax-payer, and may also increase the valuation of the property scheduled by him. It follows that the tax-payer is not precluded from a hearing before the board of review by a failure to file a schedule with the board of assessors. The schedules were disregarded by the board of assessors and the assessments made in higher amounts in the following cases: *Ayers v. Widmayer*, 188 Ill. 121; *Coxe Brqs. v. Salomon*, id. 571; *Scripps v. Board of Review*, 183 id. 278; *Railway Co. v. Miller*, 72 id. 144; *Tolman v. Raymond*, 202 id. 197; *Railway Co. v. People*, 195 id. 184.

The board of review is not bound by the schedule filed by a tax-payer with the board of assessors. It may, on its own motion or the complaint of another, review and increase the assessment of any tax-payer, notwithstanding the fact that such tax-payer has filed a schedule with the board of assessors and such schedule has been adopted by that board as its valuation and assessment of his property.

It follows that the board of review may review and reduce an assessment, which may or may not include a penalty, made by the board of assessors where the tax-payer has filed no schedule. Its power is full, adequate and complete. The schedules and assessments based thereon were disregarded and the assessments increased by the board of review in the following cases: *Tolman v. Salomon*, 191 Ill. 202; *Express Co. v. Raymond*, 189 id. 232; *Earl & Wilson v. Raymond*, 188 id. 15; *Martin v. Barnett*, id. 288; *Pratt v. Raymond*, id. 469.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a petition for a writ of *mandamus* filed by the board of assessors of Cook county against the board of review of that county to compel the board of review to remove from the assessment books of the county certain personal property assessments reviewed and corrected by said board of review in the year 1908 and to insert in the place thereof, in said books, the assessments made by said board of assessors for said year. The board of review filed an answer to said petition and the board of assessors a demurrer to said answer, which demurrer was overruled, and the board of assessors having elected to stand by its demurrer, the suit was dismissed, and the board of assessors has prosecuted an appeal to this court.

The pleadings show that in 1908 the board of assessors of Cook county required every person in the county to make, sign, swear to and file with said board the personal property schedule provided for by the statute, and that various persons described in said petition (naming them) neglected and refused to make such schedule or to subscribe and swear to the same and file the same with the board of assessors; that the board of assessors thereupon listed the personal property of such persons, according to its best knowledge, information and judgment, at its fair cash

value, and added to such valuation a penalty of fifty per cent of such valuation, and entered the aggregate of such assessment and penalty in the assessment books of the county as the assessment of said persons and thereafter returned the assessment books, as provided by law; that complaints in writing, alleging that their property had been incorrectly assessed by the board of assessors, were filed with the board of review; that said board of review thereafter reviewed and revised said assessments as to such persons who had neglected and refused to make, subscribe, swear to and file with the board of assessors a schedule of their personal property, and entered upon said assessment books the result of its action in reviewing and revising said assessments as the true assessment of the personal property of such persons, and that as the result of such review and revision the board of review in many instances reduced the assessments of such persons, and in some instances remitted the entire amount of the penalty imposed upon such property owners for a failure to make and file a schedule of their personal property with the board of assessors.

The board of assessors contends that when an owner of personal property, upon the request of the board of assessors, has neglected or refused to make, subscribe and swear to the schedule of his personal property and file the same with the board of assessors, as provided by the statute, and the board of assessors has estimated the value of his personal property in gross, at its fair cash value, and added a penalty of fifty per cent to such valuation and set the same down in the assessor's books as the total personal property assessment of such person, the board of review is bound by the action of the board of assessors and is without jurisdiction or authority to review said assessment or to remit any part of such penalty; while the board of review contends that it has the right to review and revise said assessment the same as any other assessment, and that it may raise or lower the assessment or remit said penalty and correct said

estimate in such manner as to the board of review shall seem just.

The statute (Hurd's Stat. 1908, chap. 120, par. 313,) provides that the board of assessors shall require every person to make, subscribe, swear to and file the schedule provided for by the statute, and that if any person shall neglect or refuse to make and file such schedule or to subscribe and swear to the same, the board of assessors shall list the property of such person, according to its best knowledge, information and judgment, at its fair cash value, and shall add to such valuation an amount equal to fifty per cent of such valuation, which aggregate amount shall be the assessment of such person; and paragraph 329 of said statute provides, on complaint, in writing, that any property described in such complaint is incorrectly assessed, the board of review shall review the assessment and correct the same as shall appear to be just. The language of paragraph 329 is very broad, and, we think it clear, applies to an assessment made under the provisions of paragraph 313. It states that any property which has been incorrectly assessed may be reviewed and corrected by the board of review. We see no reason why a person who has failed to file a schedule should be required to pay taxes upon an amount which is too high or be allowed to escape taxation by paying taxes upon an assessment which is too low. The penalty fixed by the statute for a failure to file a schedule is, that there shall be added to the "fair cash value" of such person's property "an amount equal to fifty per cent of such valuation," and not that a person failing to file such schedule shall be absolutely bound by the value which the board of assessors may have fixed as the "fair cash value" of his property and an amount equal to fifty per cent of such valuation. Our conclusion is, that the property owner who has failed to file a schedule has the right to have the board of review review and revise his assessment, the same as any other tax-payer.

It is said, however, that the result of this holding will be to permit a tax-payer who has failed to file a schedule and who has been assessed by the board of assessors and had a penalty of fifty per cent of the fair cash value of his property as fixed by the board of assessors added to his assessment, to escape such penalty by filing a complaint with the board of review for a review of his assessment, as it is claimed the board of review has no power to impose a penalty, and if it interferes with the assessment it must necessarily remit the penalty. In other words, if the board of review raises the assessment or lowers the assessment, the assessment as corrected would be the amount of the fair cash value of the property as fixed by the board of review, exclusive of the penalty, the result of which would be to remit the penalty. It is true that the board of review is given no power to impose a penalty for a failure to file a schedule upon property originally assessed by it, such as omitted property. When, however, the board of review revises the assessment of property made by the board of assessors its jurisdiction is revisory and not original in its character, and it may affirm the action of the board of assessors,—that is, it may neither raise nor lower the assessment made by that body, or it may raise or it may lower the assessment. It is, however, required by the statute, in reviewing and revising an assessment, to correct the assessment in such manner “as shall appear to be just,”—that is, according to law,—and no arbitrary discretion is conferred upon that board by the statute, and if a tax-payer has wrongfully failed to file a schedule of his personal property and has incurred a penalty of fifty per cent upon its “fair cash value,” the board of review in that instance would not have the right to relieve him of the penalty, but under the statute the board of review, in correcting the assessment so as to make it a just assessment,—that is, a lawful assessment,—would be required to add to whatever amount it found to be the “fair cash value” of the personal

property assessed, an amount equal to fifty per cent of the amount so determined by it as the fair cash value of the property, and to extend upon the assessment books, as corrected by it, the aggregate of those two amounts as the corrected assessment.

We think it clear from an examination of all the provisions of the act of 1898 (Hurd's Stat. 1908, p. 1809,) that it was the intention of the General Assembly that the board of review created by that statute should have the power to review all assessments of personal property made by the board of assessors, and that an assessment made in a case where a schedule had not been filed and where a penalty of fifty per cent of the fair cash value of the property assessed had been added, is not taken out from under the jurisdiction of the board of review by the statute. The statute is general in its terms and confers upon the board of review the right to review and correct assessments in all cases, and as those cases where penalties are imposed for a failure to file a schedule are not excepted from the jurisdiction of the board of review, those cases must be held to be included within the general terms of the statute which confers the right of review upon the board of review. The question of the right to maintain this suit upon the relation of the board of assessors has not been raised or discussed, and the fact that this case has been disposed of on its merits is not to be taken as committing this court to the view that a suit of this character will lie upon the relation of the board of assessors.

Finding no reversible error in this record the judgment of the circuit court will be affirmed.

Judgment affirmed.

AUGUST BECKER *et al.* Appellants, *vs.* WALTER BECKER
et al. Appellees.

Opinion filed October 26, 1909.

1. **CONTRACTS**—*ante-nuptial contracts are generally recognized as valid.* Contracts between parties contemplating marriage, which seek to preserve to each the ownership and control of his or her separate property and to provide for a different disposition of the property at death than is provided by the statute governing the disposition of the estate of a deceased husband or wife, are generally recognized as valid by the courts, especially courts of equity.

2. **SAME**—*rule where an estate is to vest upon happening of an event.* Where an estate is to vest upon the happening of an event it must be shown that the event has taken place, and if the event consists of several particulars it must be shown that every particular has been performed.

3. **SAME**—*legal title to land does not vest by contract—specific performance.* Where an ante-nuptial contract provides that upon the wife's death the husband shall immediately become vested with the title to all her property, the legal title to her real estate does not vest in the husband at her death but vests in her heirs; but if the husband has complied with the conditions of the contract he becomes the equitable owner of the land and may compel specific performance against her heirs in a court of equity.

4. **SAME**—*when provision that the wife's property shall vest in husband cannot be enforced.* Where a provision of an ante-nuptial contract that the wife's property shall vest in the husband at her death is based upon the consideration, in part, that the husband will keep in force a certain existing life insurance policy, or its equivalent, during his life, the proceeds of which shall belong to the wife if she survives him, failure of the husband to keep the insurance in force defeats his right to enforce such provision against the heirs of the wife, either affirmatively or as a defense to their bill for partition.

VICKERS, J., dissenting.

APPEAL from the Circuit Court of Whiteside county;
the Hon. EMERY C. GRAVES, Judge, presiding.

SKINNER & COE, CHARLES A. BIERNATZKI, and JARVIS
DINSMOOR, for appellants.

A. A. WOLFERSPERGER, and C. C. McMAHON, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by the complainants, against the defendants, as heirs-at-law of Augusta Mishler, deceased, in the circuit court of Whiteside county, to partition certain lands situated in said county, of which it was alleged said Augusta Mishler died seized. Jesse Mishler, the surviving husband of Augusta Mishler, was made a party defendant to the bill. Mishler interposed a demurrer to the bill, which was sustained, and a decree was entered dismissing the bill for want of equity, and the complainants in the bill have prosecuted this appeal to reverse said decree.

The bill alleged that in the year 1889 Augusta Scheer (at the time of her death Augusta Mishler) and Jesse Mishler contemplated marriage; that on the 16th day of March of that year they entered into an ante-nuptial contract in writing, which was in words and figures as follows:

"This agreement, made this 16th day of March, 1889, between Augusta Scheer, of the city of Sterling, in Whiteside county, in the State of Illinois, of the first part, and Jesse Mishler, of said county and State, of the second part:

"Witnesseth: That whereas marriage is about to be had and solemnized between said parties; and whereas the said Augusta Scheer is possessed of real and personal estate situated in said county, consisting of lands, chattels and negotiable securities, and the said Jesse Mishler is also possessed of real and personal estate, consisting of farm lands and stock, etc., situated in the county aforesaid; and whereas it is mutually desired by the parties that the real and personal estate of each shall remain separate and be subject only to the sole control of its respective owners, as well after marriage as previous thereto, during their joint lives, they mutually agree and covenant that all the estate now owned or possessed by said Augusta Scheer, or which

she may hereafter acquire or become entitled to in any way or manner, shall remain her separate property, subject entirely to her individual control and management, the same as if she were unmarried, the said Jesse Mishler not acquiring by force of such marriage, for himself or his creditors, any interest therein or in the use or control thereof or in the rents and profits arising therefrom during the lifetime of the said Augusta Scheer, and that all the said estate, real and personal, now owned or possessed by Jesse Mishler, or which he may hereafter acquire or become entitled to in any way or manner, except as hereinafter provided, shall remain his separate property, subject entirely to his individual control and disposition, and discharged, at his death, of the dower and homestead rights of said Augusta Scheer, and also discharged of all and every claim, right and demand in the personal estate of Jesse Mishler which a widow is entitled to under and by virtue of the laws of the State of Illinois in the personal estate of her husband, the said Augusta Scheer not acquiring, by the force of her marriage, for herself, her heirs, assigns or creditors, any interest therein or control thereof, or in the rents and profits thereof, during the life of the said Jesse Mishler or after his death: *Provided, however*, that at the death of the said Jesse Mishler, if the said Augusta Scheer shall survive him, she shall be entitled to the money arising from a policy of insurance of \$2000 in the Whiteman's Life Insurance Company issued upon the life of said Jesse Mishler and now in full force and effect, which said policy, or its equivalent in some reputable company, shall be kept in full force and effect during the life of said Jesse Mishler as part of the consideration of these presents. Now, therefore, in consideration of such marriage, and of the further consideration mentioned hereafter, it is agreed by Jesse Mishler that he will waive and release and relinquish unto Augusta Scheer all dower interest in the real estate now possessed by her or which she may hereafter acquire

or become entitled to in any manner, of which she may become vested by force of the contemplated marriage, and at all times permit said Augusta Scheer to control said estate, and all her personal estate that she may now be possessed of or which may hereafter come to her, and to receive, expend and re-invest the income, rents and profits therefrom at her discretion and to her own separate use, the same as though unmarried; and therefore it is agreed by said Augusta Scheer, in consideration of said marriage and of the foregoing covenants on the part of Jesse Mishler, that she expressly waives and relinquishes unto Jesse Mishler all dower and homestead right and interests in the real estate of which he is now possessed or which he may hereafter acquire or in any manner become entitled to, of which she may become vested by the contemplated marriage, and she hereby expressly relinquishes all claim in and to the personal estate of which Jesse Mishler is now possessed or hereafter may acquire or in any manner may become entitled to, in case the said Augusta Scheer shall survive the said Jesse Mishler, save and except the \$2000 life insurance policy aforesaid. And she hereby covenants and agrees, in consideration of said marriage and the aforesaid covenants and acquirements entered into on the part of Jesse Mishler, that the said Jesse Mishler shall at her, the said Augusta Scheer's, death have as his own an absolute fee simple title in and to all the real estate of which she may die seized, and shall have, possess, control and own absolute all the personal estate, of every description, of which she may die possessed or which she may be entitled to, free from let or hindrance upon the part of the heirs of the said Augusta Scheer. The purpose and meaning hereof being, that in case Augusta Scheer shall survive the said Jesse Mishler she have her own separate estate and the money arising from the life insurance policy aforesaid, discharged of any right or interest, claim or demands, of the heirs of the said Jesse Mishler, but in case she shall not survive the said

Jesse Mishler, the latter shall at her death become immediately vested with all the absolute right, title and ownership in and to all the real and personal estate of which the said Augusta Scheer may die seized or possessed, to the exclusion of the heirs of the said Augusta Scheer."

The bill further alleges that subsequent to the date of said contract said Jesse Mishler and said Augusta Scheer were married and lived together as husband and wife until the death of said Augusta Mishler, in the year 1905; that Jesse Mishler did not keep the insurance policy mentioned in said contract in force but permitted the same to lapse many years prior to the death of his wife, and never took out any policy of insurance upon his life in lieu thereof in any other insurance company, and thereby the said Jesse Mishler failed to comply with said contract on his part, by means whereof said contract became null and void. The bill prayed that the rights of the parties in the lands of which Augusta Mishler died seized might be settled and determined, and in case the lands could not be divided, that they be sold and the proceeds divided.

The main question to be determined upon this appeal is, Jesse Mishler having failed to keep the life insurance policy mentioned in said contract in force, what rights, if any, under said contract, did he take in the real estate of his wife upon her death?

The contract provided that the wife should take no interest in the estate of her husband upon his death if she survived him, and that the husband should take no interest in the estate of his wife upon her death if he survived her, which might grow out of the marital relations under the law, and that each should control their respective estates during their married life, freed from the control of the other,—that is, the rights and interests which the survivor was to have in the estate of the one who should first die were sought to be regulated and controlled by the contract which they entered into prior to their marriage, and not by

the statute governing the disposition of the estate of a deceased wife or deceased husband. Contracts of the character of the one entered into between the said parties are generally recognized as valid by the courts. Especially is this true in courts of equity. An examination of the terms of the contract here involved will disclose, in addition to the provisions above referred to, that if the wife should survive the husband, in lieu of the rights conferred upon her by statute she should take the proceeds of the \$2000 life insurance policy then in force upon the life of her husband, which he agreed to keep in force, and the wife covenanted and agreed with the husband, in case he survived her, in lieu of his statutory rights in her estate and "in consideration of said marriage and the aforesaid covenants and acquirements entered into on the part of Jesse Mishler, that the said Jesse Mishler shall at her, the said Augusta Scheer's, death have as his own an absolute fee simple title in and to all the real estate of which she may die seized, and shall have, possess, control and own absolute all the personal estate, of every description, of which she may die possessed or which she may be entitled to, free from let or hindrance upon the part of the heirs of the said Augusta Scheer."

It is apparent that the wife, by virtue of the contract, took no interest in the estate of the husband during his life and that the husband took no interest in the estate of the wife during her life. If, however, the husband survived the wife, it was agreed, "in consideration of said marriage and the aforesaid covenants and acquirements entered into on the part of Jesse Mishler," he was to have her entire estate. One of the covenants and agreements which Jesse Mishler had entered into by the contract was, that he would keep in force, for the benefit of his wife, the \$2000 life insurance policy on his life. This he failed to do, and the question to be determined in this case is narrowed to the question, did his failure to keep and perform that covenant

defeat his right to receive the wife's entire estate upon her death, in case he survived her, by virtue of the terms of said contract?

It is clear that the husband took no interest in his wife's estate during her life, and if he ever took an interest therein under said contract he took such interest at her death. The contract was not in the nature of a deed and does not purport to invest him with the title to said estate. The legal title to the lands of Augusta Mishler did not, therefore, pass to Jesse Mishler, under said contract, at the time of her death, but under the law vested in her heirs, and Jesse Mishler at most, upon her death, took an equitable interest in her estate. The legal title having vested in the heirs of Augusta Mishler, if under the terms of the contract Jesse Mishler upon her death became the equitable owner of her lands, a court of equity, on a bill filed for that purpose, might specifically enforce the terms of said contract against her heirs, and by decree invest Jesse Mishler with the legal, as well as the equitable,—that is, the absolute,—title to said estate. (*Johnston v. Spicer*, 107 N. Y. 185; 13 N. E. Rep. 753.) Had, however, the husband filed a bill against the heirs of his deceased wife for a specific performance of the contract entered into between himself and wife prior to their marriage and to have invested in himself the legal title to said lands of his wife, it would have devolved upon him, in order to entitle him to relief, to establish that he had performed the "covenants and acquirements entered into" on his part, which would have required proof on his part that he had kept in force, for the benefit of the wife, said \$2000 insurance policy. While the bill in this case was filed by the heirs of Augusta Mishler and not by the husband, and was for the partition of the lands of the deceased wife, to hold that the heirs were not entitled to partition of the lands of which the wife died seized was to hold that the husband had performed the covenants and requirements to be performed by

him as provided by said contract and to give effect to the contract against the heirs, which was, in legal effect, to specifically enforce, in favor of the husband and against the heirs of the wife, said contract.

The general rule is, that where an estate is to vest upon the happening of an event it must be shown that the event has taken place, and if the event consists of several particulars it must be shown that every particular has been performed. In *Nevius v. Gourley*, 95 Ill. 206, the testator provided for the payment of three money bequests, and then directed if a devisee named in the will should pay said bequests "out of his own private funds" within one year, certain lands should go to said devisee. The devisee paid two bequests but neglected to pay the third, and it was held that the title to the land did not vest in the devisee. The court, on page 213, said: "We understand the rule to be that a precedent condition must be strictly performed, and where there is a substantial deviation from the intent of the testator as expressed in the will, the title will not vest. Kent, in volume 4, section 125, in discussing this subject, says: 'Precedent conditions must be literally performed, and even a court of chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed.'" And the court then quotes as follows from *Vanhorne v. Darrence*, 2 Dall. 317, 1 Jarman on Wills, (2d ed.) p. 672, and *Reynesh v. Martin*, 3 Atk. 330: "In *Vanhorne v. Darrence*, 2 Dall. 317, it is said, where an act is previous to an estate and that act consists of several particulars, every particular must be performed before the estate can vest or take effect. (See, also, 1 Jarman on Wills, (2d ed.) p. 672, and notes, and *Reynesh v. Martin*, 3 Atk. 330.) In the last case cited it is said: 'But in our law, where the condition is precedent the legatory takes nothing till the condition is performed,

and consequently has no right to come and demand the legacy, but it is otherwise where the condition is subsequent.' ”

The marriage of Augusta Scheer and Jesse Mishler was not the sole consideration for the vesting of the estate of the wife, upon her death, in her proposed husband. The marriage had been consummated long prior to the time when the estate was to vest. The covenants that the wife, in case she survived her husband, was to have as her portion the proceeds of said insurance policy, and in case the husband survived the wife he was to have her entire estate, were mutual covenants and were dependent upon each other, and the husband having violated his covenant to keep in force the life insurance, it would be, we think, clearly inequitable to enforce the covenant of the wife in his favor, to the exclusion of the right of her heirs to participate in the division of her estate.

In *Sullings v. Sullings*, 91 Mass. 234, by an ante-nuptial agreement Sullings agreed to procure and convey certain bank shares to a trustee for the benefit of his proposed wife, and in the event of the marriage and the continuance in life of the parties for five years thereafter to pay \$200 a year, to be held in trust for the benefit of the intended wife, provided he should die in her lifetime, and she agreed to accept the provisions so made for her comfort and support in lieu of dower and as a bar to every other claim by her upon the estate of her husband after his death. The parties married and lived together over fifteen years, when the husband died. The bank stock was not transferred to the trustee until nearly four years after the marriage and none of the payments of money were made during his life. Under these circumstances the court refused to compel the widow specifically to perform her agreement. See, also, *Butman v. Porter*, 100 Mass. 337; also *Freeland v. Freeland*, 128 Mass. 509, where, on page 510, it is said: “It is true that where, by reason of the default or neglect of the husband, the wife has lost the benefit intended to be secured

to her by a contract of this nature, her right to dower in his estate is not barred by virtue of the stipulations in the contract, for though the covenant not to claim dower is valid independently of the statute, when made for an adequate consideration and with a full understanding of its force and effect, nevertheless, when it is contained in the same instrument with covenants and agreements of the husband which form a part, with it, of one mutual arrangement, the failure of the part of the arrangement which is designed for the benefit of the wife, through the fault or negligence of the husband, is enough to destroy the binding effect of her covenant." While in that case the widow was held to be bound by the contract, the husband in no event was to receive any interest in her estate, which was conveyed to a trustee for her benefit, and she was to have the entire control of the estate during her life and the power to dispose of it at her death, and if she failed to dispose of it at her death it was to go to her heirs, to the exclusion of her husband. The contract expressly provided that the \$1500 to be paid her was to be a debt against her husband's estate. The court held she took her chances of there being sufficient assets of her husband's estate, in case he died first, to pay her that amount, while in the case at bar the maintenance of the insurance policy for the wife's benefit was a condition precedent to the vesting of her entire estate in the husband, should he survive her. And in *York v. Ferner*, 59 Iowa, 487, the widow brought an action against the administrator of her deceased husband to recover an annuity provided for in an ante-nuptial contract. It appeared that subsequent to the marriage she abandoned her husband without legal cause, and the court refused to specifically enforce the ante-nuptial contract.

Had Jesse Mishler performed the covenants and agreements in the contract which he made with his wife, the contract would have been binding upon the wife and would have furnished a basis whereby he could have acquired the

absolute title to her real estate as against her heirs. Upon her death the legal title to her real estate vested in her heirs, and when the husband asserted title to her real estate under said contract, it devolved upon him to make it appear that he had performed the covenants and agreements agreed to be performed by him. This he failed to do.

Counsel for Jesse Mishler have cited numerous cases to the effect that where numerous covenants are contained in a contract and some one or more of them have been broken, and the broken covenants are not conditions precedent, the remedy upon a broken covenant is by action for damages. While this is the general rule, we fail to see the application of the principle announced in those cases to the case at bar. Had the title vested in Jesse Mishler to his wife's lands by deed made by her in her lifetime, then the remedy of the wife, in case she had survived him, for a failure to keep in force said life insurance policy may be conceded to have been an action against his estate upon the broken covenant. That, however, is not this case. The case here presented is one where a man agrees with a woman with whom he contemplates marriage, that he will keep in force an insurance policy upon his life for her benefit, in case she shall survive him, if she will agree that in case he survive her he shall receive all her property at her death, and the intended husband, after marriage, fails to perform his part of the agreement by neglecting or refusing to keep the insurance policy for the benefit of his wife in force, and a court of equity is asked to enforce, after her death, against her heirs, in favor of the husband, the covenant that upon the death of his wife he shall receive the entire estate, by, in effect, decreeing a specific performance of the contract in his favor, although it clearly appears from the bill that the condition, expressed in the form of a covenant, upon which the husband was to have the right to inherit the entire estate of his wife had been broken by the husband.

We are of the opinion the circuit court improperly sustained the demurrer to the bill of complaint. The decree will therefore be reversed and the cause will be remanded to the circuit court, with directions to that court to overrule the demurrer.

Reversed and remanded, with directions.

Mr. JUSTICE VICKERS, dissenting.

J. B. PIOT, Admr., Defendant in Error, vs. E. R. DAVIS,
Plaintiff in Error.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*when claim that the answer must be taken as true is not borne out by record.* A claim that the answer to a foreclosure bill must be taken as true because no replication was filed is not borne out by the record, where the record does not purport to be complete, the certificate of the clerk merely stating that the record contains a true copy of "the bill of complaint, summons, answer, certificate of evidence and decree."

2. SAME—*when filing of replication will be held to have been waived.* Where a foreclosure case is not heard upon bill and answer but upon the pleadings and evidence, the filing of a replication will be held, on appeal, to have been waived.

3. MORTGAGES—*parties claiming through mortgagor are proper and necessary parties to foreclosure suit.* All persons claiming by or through the mortgagor or under his chain of title are proper and necessary parties to a bill to foreclose the mortgage, and when such parties are brought before the court their rights may be passed upon and settled by the decree.

4. SAME—*when rights of holder of unrecorded deed are subject to lien of mortgage.* Where a father holding an unrecorded deed to land the record title of which is in his daughter, who resided with her parents on the land when the deed was made, assists the daughter in mortgaging the land, tells the mortgagee that it is all right to make the loan, and thereafter insures the buildings on the land in the daughter's name and at times pays the interest on the mortgage, it is proper, in a proceeding to foreclose the mortgage, to hold the rights of the father to be subject to the mortgage lien.

5. SAME—court may, in foreclosure, settle priorities between mortgage and unrecorded deed from mortgagor. In foreclosure the court may settle the question of priority as between the mortgage and a prior unrecorded deed from the mortgagor, where the bill alleges that the defendant holding the unrecorded deed claims some interest in the premises, in possession or otherwise, but avers that such interest is subject to the complainant's mortgage, and the answer of such defendant alleges that he owns the fee by deed from the mortgagor and possession thereunder, and denies that his rights are subject to the mortgage.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding.

JAMES J. RAFTER, for plaintiff in error:

A defendant to a bill to foreclose a mortgage is not a proper party when it appears by his answer and proof that he claims under an adverse legal title acquired prior to the making of mortgage. *O'Connell v. O'Connor*, 191 Ill. 222; *Gage v. Perry*, 93 id. 176; *Bozarth v. Landers*, 113 id. 181.

Where an estoppel is relied upon in equity it must be pleaded, and proved by clear, precise and unequivocal evidence. *Railway Co. v. Coal Co.* 230 Ill. 169; *Crone v. Crone*, 180 id. 606; *Johnson v. Johnson*, 114 id. 611; *Insurance Co. v. Meyer*, 93 id. 271.

Estoppel *in pais* must be based upon a fraudulent purpose and a fraudulent result. Fraud is not presumed but must be proven, and if the element of fraud is wanting there is no estoppel. 2 Story's Eq. Jur. sec 1543; Bigelow on Estoppel, 60; *People v. Brown*, 67 Ill. 435; *Gallagher v. Northrup*, 215 id. 563.

The bill waives an answer under oath. The answer of plaintiff in error, for want of a replication, is taken as true. Hurd's Stat. 1905, chap. 22, sec. 29.

The evidence of a warranty deed and possession antedating four years the mortgage from Inez Davis to E. R.

Davis overcomes the mortgage title herein. 6 Am. & Eng. Ency. of Law, (2d ed.) 156; *Glos v. Greiner*, 226 Ill. 548.

A warranty deed, when duly executed, is deemed and held a conveyance in fee simple to the grantee. Hurd's Stat. 1905, chap. 30, sec. 9.

Possession is notice to the world of the right of the possessor. *Flint v. Lewis*, 61 Ill. 299; *Druley v. Adam*, 102 id. 177; *White v. White*, 105 id. 313; *Jaques v. Lester*, 118 id. 246; *Harris v. McIntyre*, id. 276; *Morrison v. Morrison*, 140 id. 560; *Joiner v. Duncan*, 174 id. 252.

Proof of possession under a claim of ownership is *prima facie* evidence of ownership. *Glos v. Huey*, 181 Ill. 150; *Harlan v. Eastman*, 119 id. 22.

The assignee of a trust deed in the nature of a mortgage takes it subject to all defenses which could be made against the grantee. *Olds v. Cummings*, 31 Ill. 188; *McAuliffe v. Reuter*, 166 id. 491; *Trust Co. v. Aff*, 183 id. 91; *Buehler v. McCormick*, 169 id. 269; *Bouton v. Cameron*, 205 id. 63.

The allegations in a bill of chancery, the proof and the decree must agree or no recovery can be had. If the complainant fails to prove his case as made in the bill he will not be entitled to recover, although the facts actually proved by him would have entitled him to relief had his bill been framed upon a different theory. *McKay v. Bissett*, 5 Gilm. 499; *Kellogg v. Moore*, 97 Ill. 282; *Brockhausen v. Bochland*, 137 id. 552; *Page v. Greeley*, 75 id. 400; *DeLeww v. Neely*, 71 id. 473; *Millard v. Millard*, 221 id. 86; *Dorn v. Geuder*, 171 id. 262; *Higgins v. Higgins*, 219 id. 153; *Long v. Metzger*, 206 id. 488.

LOUDEN & CROW, for defendant in error:

The transcript in this case is not certified by the clerk to be a "full, true and complete" transcript of the record of the proceedings had in the court below, and for that reason this court has no jurisdiction to reverse the decree of that

court for the alleged errors assigned or either of them. *Glos v. Randolph*, 130 Ill. 245; *Bertrand v. Taylor*, 87 id. 235; *Deimel v. Parker*, 164 id. 627; *Road District v. Miller*, 156 id. 221; Practice act of 1907, sec. 100.

Error is never presumed, and he who alleges it must make the same appear from the record. *Graham v. Dixon*, 3 Scam. 115.

An unverified answer is not evidence for any purpose but is a pleading only, and the want of a replication is not ground for reversal where the parties have submitted the cause for decision upon pleadings and proof and the court heard the proof without objection. *Marple v. Scott*, 41 Ill. 50; *Jones v. Neely*, 72 id. 449.

MR. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery, in the usual form, filed by J. B. Piot, the testator of the defendant in error, in the circuit court of St. Clair county, against Inez Schmith, Albert L. Schmith, E. R. Davis and others, to foreclose a mortgage in the nature of a trust deed, bearing date September 28, 1899, upon premises located in said county, given by Inez Schmith and husband to H. D. Sexton, as trustee, to secure the payment of a promissory note of even date with said mortgage, for the sum of \$2000, due one year after date, bearing interest at six per cent per annum, and signed by Inez Schmith and payable to H. D. Sexton, and by him endorsed and delivered to the testator of the defendant in error, before maturity. The defendants, with the exception of E. R. Davis, made default, and Davis answered the bill. The issues were tried by the court, and a decree was entered in favor of the testator of the defendant in error for \$2403.70, which decree was affirmed by the Appellate Court for the Fourth District, and E. R. Davis has sued out this writ of error to review the judgment of the Appellate Court.

During the pendency of the case in the Appellate Court the death of J. B. Piot was suggested, and his executor, J. B. Piot, was substituted as defendant in error in his stead.

It appears from the pleadings, proofs and decree that prior to the tenth day of June, 1891, the premises in question belonged to the wife of the plaintiff in error, and that thereafter the same were conveyed by her and the plaintiff in error to their daughter, Inez Davis, (now Inez Schmith,) and that on June 11, 1895, Inez Davis conveyed the same to E. R. Davis for \$625, which deed was recorded on October 20, 1904; that during the time the title was in the wife of the plaintiff in error, the plaintiff in error and wife mortgaged the same to John Drury for the sum of \$1000; that the daughter, at the time of the conveyance to plaintiff in error, resided upon said premises with her parents; that subsequent to the conveyance to plaintiff in error he caused the buildings on the premises to be insured in his daughter's name, and that at the time the loan sought to be foreclosed was being negotiated, the plaintiff in error stated to Sexton, who made the loan, that "they were very much in need of the money and that it would be all right to make the loan;" that out of the proceeds of the loan the debt due John Drury was paid and his mortgage released; that during all that time the title had stood of record in Inez Davis, and that plaintiff in error, subsequent to the date of the mortgage, at times paid the interest thereon as it accrued and thereby recognized the validity of the mortgage.

There is, as the Appellate Court suggests, some conflict in the testimony. We, however, agree with that court that the evidence fairly tends to show that E. R. Davis assisted his son-in-law and daughter in negotiating said loan, and that he never made any claim that he owned said premises or had any interest therein until October 20, 1904, some five years after said loan was made, when he recorded the deed to him from Inez Davis, his daughter.

It is first contended that the record fails to show that a replication was filed to the answer of the plaintiff in error, and it is said that the answer for that reason should be taken as true. The certificate of the clerk, attached to the record, states that the record contains a correct copy of "the bill of complaint, summons, answer, certificate of evidence and decree." From what appears in this certificate it may be a replication was filed. In any event, the case was not heard upon bill and answer but upon the pleadings and evidence, and in that state of the record the filing of a replication would be held to have been waived. *Marple v. Scott*, 41 Ill. 50; *Jones v. Neely*, 72 id. 449.

It is next contended that the plaintiff in error established legal title in himself to the premises by the deed from his daughter to him and by proof of possession of the premises under said deed, and that in this proceeding the court did not have the power to decree that the title held by him was subject to the lien of the mortgage sought to be foreclosed. The title of the plaintiff in error was not adverse to the mortgagor. In *Gage v. Perry*, 93 Ill. 176, on page 179, it was said: "In a bill to foreclose a mortgage, not only the mortgagor, but all persons claiming by, through or under him or under his chain of title, are proper and necessary parties to the bill, and when such parties are brought before the court their rights may be passed upon and settled by a decree."

The plaintiff in error relied upon an unrecorded deed from the mortgagor, and the evidence showed that the loan was negotiated by him, or with his assistance, knowledge and consent, and the mortgage given to secure it was recognized by him as a valid mortgage for a number of years after it was executed and recorded, and after the execution of the mortgage the title was recognized by him as being in Inez Davis, and we think, under well settled equitable principles, the court properly held the lien of the mortgage was superior to plaintiff in error's rights in the premises.

This case differs from the cases relied upon by plaintiff in error where it was held that adverse claims of title in no way connected with the title of the mortgagor are not a proper subject of consideration in a suit to foreclose a mortgage. *Gage v. Perry, supra*; *Bozarth v. Landers*, 113 Ill. 181; *O'Connell v. O'Connor*, 191 id. 215.

It is finally contended that the facts averred in the bill of complaint, and proven, were not sufficient to entitle the complainant to relief as against the plaintiff in error. The bill averred that E. R. Davis had, or claimed to have, some interest in the mortgaged premises, in possession or otherwise, but that whatever rights or interests he had therein were subject to the rights of complainant, and the answer of Davis averred he was the owner of said premises in fee by virtue of the deed executed to him by Inez Davis and by virtue of his possession of said deed, and denied that his rights were subject to said mortgage. The complainant and Davis both claimed an interest in said premises,—the one a lien and the other a fee,—by virtue of conveyances from Inez Davis. The question, therefore, made by the pleadings was, which had the prior right in said premises? and we are unable to see why the court, under the pleadings, could not properly determine and establish the priorities of the parties in the premises. The evidence showed the plaintiff in error's deed was not recorded; that after it was made his daughter remained in possession of the premises, and that he said to Sexton, at the time the loan was made, "it would be all right to make the loan," and that after the loan was made he recognized the premises as belonging to Inez Davis by taking out insurance thereon in her name and the validity of the mortgage by paying interest on the indebtedness secured thereby. Had the parties each held mortgages upon the premises executed by Inez Davis, clearly the court would have had the power to settle their priorities under averments similar to those found in this bill and answer, and we think the fact that one of

the parties held an unrecorded deed did not deprive the court of the power to establish a lien in favor of the complainant against the land, which might defeat the title of the plaintiff in error if the lien should be foreclosed by a sale and no redemption of the premises should be effected.

The decree entered in this case does substantial justice between the parties and was properly affirmed by the Appellate Court. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HENRY. WILLIAMS *et al.* Appellants, *vs.* WILLIAM M. LANGWILL, Appellee.

Opinion filed October 26, 1909.

DEEDS—*when a deed will not be set aside for grantee's alleged failure to keep agreement.* While a deed from parent to child will be set aside in equity if the grantee refuses to keep his agreement to live with and support the grantor for life, yet where the grantor is the moving party in the transaction, which he enters into deliberately and without fraud or undue influence by the grantee and by his own act prevents the grantee from keeping his agreement, the rule does not apply and the deed will not be set aside.

APPEAL from the Circuit Court of McHenry county; the Hon. CHARLES H. DONNELLY, Judge, presiding.

SHURTLEFF & HEIZER, and JAMES F. CASEY, for appellants.

CHARLES H. WAYNE, and V. S. LUMLEY, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by John J. Evans in the circuit court of McHenry county, against William M. Langwill, to set aside and cancel as clouds upon his title to a farm containing one hundred and seven acres, situated in McHenry county, a deed from said John J. Evans bearing

date January 9, 1904, conveying said farm to said William M. Langwill; also certain articles of co-partnership entered into on said ninth day of January, 1904, between said John J. Evans and William M. Langwill, whereby they agreed to carry on the farming and dairying business upon said farm during the life of the said John J. Evans, which deed and articles of co-partnership were filed for record and were recorded in the recorder's office of McHenry county. A guardian *ad litem* was appointed for William M. Langwill, he being a minor, who filed an answer on behalf of said defendant, and said John J. Evans having died testate on December 7, 1904, and his will having been admitted to probate, and James F. Casey, the executor named in the will, having qualified, and James F. Casey, Henry Williams and John E. Williams, the legatees named in said will, having been substituted as complainants, they, by leave of court, filed an amended bill. The guardian *ad litem* of said defendant filed an answer thereto, and a replication was filed to said answer. The case was referred to the master in chancery to take the proof and report his conclusions as to the law and the facts, and the master in chancery having filed a report, in which he recommended that the bill be dismissed for want of equity, and objections and exceptions having been overruled to said report, the court entered a decree in accordance with the recommendations of the master in chancery, dismissing said bill for want of equity, and the complainants have prosecuted an appeal to this court to reverse said decree.

It appears from the pleadings, proofs and master's report that John J. Evans and wife resided upon said farm, as their homestead, at the time of the death of the wife of John J. Evans, which occurred in the summer of 1902; that Mary J. Langwill, who had married Charles Langwill, was the only child of John J. Evans, who survived his wife; that Mary J. Langwill and her family, at the time of the death of her mother, resided at Watertown, in the

State of South Dakota; that at the time of the death of her mother Mrs. Langwill returned to Illinois to attend her funeral; that John J. Evans was then about eighty years of age; that he then said to Mrs. Langwill that what he had would belong to her and that she ought to return to Illinois and take care of the property; that she replied to him that he had a tenant on the farm, and if he could get along until the next year, if he still wanted her and her family to return to Illinois, they would do so; that she returned to her home in South Dakota; that in the month of August the tenant upon the farm left the farm, and John J. Evans caused to be written to his daughter a letter saying the tenant had abandoned the farm and urging her and her husband to immediately return to Illinois; that upon receipt of the letter they returned to Illinois and moved onto the farm, and carried on the farm until March 1, 1903, on the same terms that it had been theretofore rented, and John J. Evans lived with them; that on the first of March, 1903, Charles Langwill, the husband of Mary J. Langwill, rented the farm for five years at \$250 per year cash rent and purchased the stock and farming implements of John J. Evans on the farm for \$700, for which he gave his four promissory notes, and John J. Evans was to make his home with Charles Langwill and family; that Charles Langwill and family continued to occupy the farm until the ninth day of January, 1904, when John J. Evans and Charles Langwill, being unable to agree, then went to the office of V. S. Lumley, an attorney at law residing in McHenry county, to adjust their differences, whereupon it was agreed that Charles Langwill was to surrender the lease of the farm, and he, with his wife and daughter, would return to South Dakota, and that Charles Langwill would release to William M. Langwill, the defendant, who was then about twenty years of age, his time until he should attain his majority; that William M. Langwill would remain on the farm with his grandfather, and that John J.

Evans and William M. Langwill would carry on the farming and dairying business together upon said farm, and that John J. Evans should surrender the notes of Charles Langwill to him and pay him \$100 in cash, and that the stock and implements upon the farm, which consisted of twenty head of cows and one bull, and certain farming implements, should be turned over by Charles Langwill to William M. Langwill, and that William M. Langwill should reside with and care for John J. Evans in his old age and pay his funeral expenses after his death, and that upon the death of John J. Evans all the property which belonged to the co-partnership should be the property of William M. Langwill, and that the farm was to be conveyed to William M. Langwill, John J. Evans reserving a life estate therein; that V. S. Lumley thereupon prepared a deed for the farm from John J. Evans to William M. Langwill, conveying the same to William M. Langwill in fee, subject to a life estate in John J. Evans, and also articles of co-partnership between John J. Evans and William M. Langwill, and an agreement to be signed by William M. Langwill, in which he agreed to remain with John J. Evans upon the farm and to care for him during his life and make his old age comfortable and to pay his funeral expenses after his death, also an assignment of the interest of Charles Langwill in said personal property to William M. Langwill; that all of said instruments in writing were executed by the proper parties, the \$100 in cash was paid by John J. Evans to Charles Langwill and the personal property was turned over to William M. Langwill, and Charles Langwill and wife and daughter on or about the first day of March left the farm and prepared to return to South Dakota, where they returned within a few days; that John J. Evans, after his son-in-law had given up the farm, found some difficulty in procuring a housekeeper, and that shortly before March 1, 1904, he leased the farm to a man by the name of Ernest Rammlein and placed him in possession of the farm on

March 1, 1904; that shortly after the farm was leased to Rammlein it was arranged between John J. Evans and William M. Langwill that as the farm had been leased and there would be nothing there for William M. Langwill to do he should return with his father and mother to South Dakota, where he could obtain work at from \$40 to \$45 a month, and that he should keep an account of his wages, and that he would put in one-half of his wages against one-half of the income of the farm; that William M. Langwill returned to South Dakota with his father and mother and sister; that on the 24th day of March, 1904, the barn in which the cows left upon the farm were kept was blown down and all of the cows but two were killed; that the tenant thereupon left the farm; that John J. Evans never asked the defendant to return to the farm, but on the second day of July, 1904, filed this bill to set aside all the transactions between himself and William M. Langwill and to recover back the farm, the bill being framed upon the theory that a confidential relation existed between John J. Evans and William M. Langwill, and that William M. Langwill had failed to keep and perform the part of the contract upon his part whereby he agreed to live with, care for and make comfortable John J. Evans for the remainder of his life, it being averred that by reason of the fact that William M. Langwill had left the farm and returned to the State of South Dakota a presumption obtained that at the time the deed and articles of co-partnership were entered into a fraudulent intent existed in the mind of William M. Langwill not to carry out said contract but to cheat and defraud John J. Evans out of his property, and a line of cases, of which *Fabrice v. Von der Brelie*, 190 Ill. 460, and *Hensan v. Cooksey*, 237 id. 620, are examples, are relied upon to sustain the bill.

It is undoubtedly the law of this State that where a child takes advantage of a parent, or one standing to him in the relation of parent, and by reason of such relation ob-

tains a conveyance of the property of the parent to him upon a promise upon his part to care for and support the parent in old age, and after the conveyance is made repudiates his agreement to furnish the parent maintenance and support, a court of equity will set aside the conveyance and restore to the parent his property. (*Cooper v. Gum*, 152 Ill. 471; *McClelland v. McClelland*, 176 id. 83.) If it appears, however, that the parent is the moving party, and that he entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation between the parties might be supposed to give rise, and the child has been prevented from executing the contract on his part by the acts of the parent, the rule above announced does not apply. In this case, while the grandfather was an old man at the time he made the deed and entered into the articles of co-partnership, he appears to have been fully possessed of his faculties, as subsequent to the execution of the deed and articles of co-partnership he executed the will under which the appellants now claim, and the grandchild was a minor who was largely under the influence of his grandfather, and who was largely influenced by the grandfather rather than the grandfather influenced by the grandchild, and that the grandfather was well satisfied with the arrangement he had made with the grandchild until after William M. Langwill had left the farm and returned to the State of South Dakota.

We have read the evidence in this case in full as it appears in the record, and are constrained to hold that it fails to bring this case within the principle of the cases relied upon by the complainants. It may be that John J. Evans was injudicious in making the deed and the contract he did. It, however, doubtless appeared to him at that time that it was for his interest to induce the grandson, if possible, who appears to have been a worthy young man and who always treated his grandfather with kindness and con-

sideration, to remain with him on the farm; and the fact that John J. Evans may have changed his mind with reference to the disposition of his property after William M. Langwill had returned to South Dakota, if he fairly entered into the arrangement he made with his grandson, would not permit him to repudiate the obligations which he had assumed and abandon the same without cause and recover back his property. In *Campbell v. Carter*, 14 Ill. 286, on page 291, the court say: "A court of equity will not interfere to relieve a party from the effects of an injudicious bargain." And in *Dickerson v. Evans*, 84 Ill. 451, on page 453, it was said: "If a party making a deed be of an advanced age * * * and illiterate, if the deed be read to her and her rights made known to her by the officer, public policy, the stability of titles, the peace of society, all demand the transaction shall not be disturbed." And in *Herr v. Payson*, 157 Ill. 244, on page 252, the court use the following language taken from the case of *Ulrich v. Muhlke*, 61 Ill. 499: "We have examined the rule of equity invoked by the complainant as applicable to such cases, and no commentator on the principles of equity, and no reported case, goes to the extent of saying that by force of such relation a deed is *ipso facto* void. * * * To render such a transaction valid it is only necessary to show that the other party had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise."

We are impressed with the fact that all the equities of the case are with the appellee, and that the circuit court reached a just and equitable disposition of the questions involved upon this record.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE OHIO OIL COMPANY, Appellee, vs. THOMAS N. SCOTT
et al. Appellants.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*effect where affirmance by Appellate Court is for a failure to comply with its rules.* If the Appellate Court affirms a judgment or decree for non-compliance with its rules for the preparation and filing of briefs and abstracts, there is nothing which the Supreme Court may review on further appeal or writ of error, either with or without a certificate of importance.

2. SAME—*Appellate Court must file opinion giving the reasons for its decision.* Under the statute it is the duty of the Appellate Court to file a written opinion giving the reasons for its decision, and while error cannot be assigned on such opinion, yet the Supreme Court has a right to look into such opinion to ascertain what questions were considered and to avail itself of the benefit and aid furnished by the reasons given in such opinion, even though the affirmance or reversal of the judgment depends upon the correctness of the judgment, irrespective of the reasons given.

3. SAME—*effect where Appellate Court's opinion does not show reasons for judgment.* If it is doubtful from the opinion of the Appellate Court whether it affirmed a decree because of a non-compliance with its rules or because of its consideration of the merits of the case the Supreme Court will neither affirm nor reverse the judgment but will remand the cause to the Appellate Court, with directions to file an opinion stating distinctly the ground upon which the judgment is based.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Lawrence county; the Hon. P. A. PEARCE, Judge, presiding.

MCGAUGHEY & TOHILL, for appellants.

CALLAHAN, JONES & LOWE, for appellee.

Per CURIAM: Appellants, as owners of certain lands in Lawrence county, Illinois, on the 6th day of April, 1906, executed and delivered to N. B. Lee what is known as an oil and gas lease. The lease purported to authorize Lee and

his assigns to enter upon the lands for the purpose of drilling and operating for oil and gas and to erect and maintain on said lands necessary buildings, structures and pipes for the production of oil and gas. February 4, 1907, Lee assigned the lease to appellee, the Ohio Oil and Gas Company. The bill alleges that Lee and appellee had complied with all the terms and requirements of the lease to be performed by them, but that when appellee attempted to enter upon said premises for the purpose of exploring for and developing oil and gas under the terms and provisions of the lease it was forbidden the right to make such entry by appellants, who with force and arms kept, and still keep, appellee off of said premises. The bill prayed that appellants, their agents and servants, be enjoined from hindering or obstructing entry upon said premises by appellee for the purpose of exploring for and producing oil and gas upon the terms specified in the lease. A hearing was had upon the bill, answer, replication and proofs and a decree entered in accordance with the prayer of the bill. From that decree appellants prosecuted an appeal to the Appellate Court for the Fourth District. That court affirmed the decree of the circuit court and granted a certificate of importance, upon which the appellants have prosecuted a further appeal to this court.

The opinion of the Appellate Court is embraced in a few lines, and, as we understand it, its judgment of affirmance was based upon the non-compliance by appellants with the rules of court in the preparation of briefs and abstracts. The court quotes rule 25, and says: "Nowhere in appellants' brief has there been any attempt to comply with this rule in any respect. In the alleged abstract twenty-three pages are covered with the detailed verbiage of the bill, amendments, motions, demurrers, answers and exceptions. The presentation of the case is such that we do not feel called upon to state and develop it in our opinion." The court then says the proceeding is in chancery; that the

chancellor heard the evidence and found all the material allegations of the bill to be true, decreed the relief prayed, and that it (the Appellate Court) thinks the evidence warranted the finding and decree. It is also stated by the Appellate Court that counsel for appellants contended appellee, who was complainant in the bill, had an adequate remedy at law, but that he had failed to suggest what the remedy was. The court then says no error in the record has been pointed out that would warrant a reversal of the decree, and it was accordingly affirmed.

It seems evident that the judgment of affirmance was not based upon a consideration of the merits of the case but was for non-compliance with the rules of the court in the preparation of the briefs and abstracts. We do not think the statement made by the Appellate Court that it thought the evidence warranted the finding and decree can be accepted as showing the judgment of affirmance was based upon a consideration of the merits of the case. There was no substantial controversy in the evidence heard by the chancellor, but the questions are almost exclusively questions of law. The execution of the lease and its assignment to appellee were not denied. It was contended by appellants that the lease was procured by Lee by fraud and misrepresentation. The facts and circumstances relied on by appellants to establish the fraud were set up in the answer, and to that part of the answer exceptions were sustained, upon the theory, evidently, that they did not constitute fraud within the meaning of the law. On the hearing appellants offered evidence to prove the alleged fraud set up in the portion of the answer to which exceptions were sustained, but the court refused to hear the proof. The material question, then, for determination in the case was whether appellee had such rights under the lease as entitled it to the relief prayed, which was, in effect, the specific performance of that instrument through the exercise of the injunctive power of the court. This was a question

of law unaffected by any controverted facts brought out in the testimony, and we do not understand from the opinion of the Appellate Court that this question,—the controlling question in the case,—received any consideration by that court because of its imperfect presentation by the briefs and abstracts, which were not prepared in compliance with the rules of the court. While error cannot be assigned upon the opinion of the Appellate Court but only upon its judgment, the statute provides: "All opinions or decisions of said court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the case in which rendered." (Hurd's Stat. 1908, chap. 37, par. 34.) This court has held that we may rightfully look into the opinion of the Appellate Court for the purpose of being advised as to the questions considered by that court and how they were disposed of. (*Penn Plate Glass Co. v. Rice Co.* 216 Ill. 567; *Chicago City Railway Co. v. Mead*, 206 id. 174.) For that purpose the rules of this court require the party bringing a case to this court from the Appellate Court to file, as an appendix to his brief, a printed copy of the opinion of the Appellate Court.

If the Appellate Court felt justified in affirming the decree of the circuit court for non-compliance with the rule relating to the preparation of and filing briefs and abstracts and affirmed the decree for that reason we would have no power to review their judgment upon an appeal, with or without a certificate of importance. It is for that court to determine for itself whether briefs and abstracts filed in said court are in compliance with its rules, and where its judgment is based on a non-compliance with the rules there is nothing for this court to review on appeal or writ of error. It is altogether different from a case where the judgment is based upon a consideration of the case. Where the judgment is based on a consideration of the case, on appeal to this court we have a right to look into the opinion of

the Appellate Court for the purpose of being advised as to the questions considered by that court, and we have a right to avail ourselves of the benefit and aid of the reasons given for the conclusion arrived at by the Appellate Court, but as error can be assigned only upon the judgment, a reversal or affirmance by this court must depend upon whether, in our opinion, the judgment is correct, irrespective of the reasons given in the Appellate Court's opinion for its judgment. If we could be required to review a judgment of the Appellate Court affirming the judgment of the trial court because appellant had not prepared and filed briefs and abstracts in compliance with the rules of the Appellate Court, it would be requiring us to review for the first time a judgment which the law requires shall first be reviewed by the Appellate Court. That court has established rules governing the presentation of cases to it for review, and if parties do not choose to comply with those rules and judgments are affirmed for such non-compliance, they cannot, by appealing to this court, have the judgments reviewed.

While it appears to us, from examination of the opinion in this case, that the judgment of affirmance was based upon appellants' non-compliance with the rules of the court, in view of some expressions in the opinion above referred to, not necessary to a decision on that ground, there is room for some doubt about the matter. We will therefore neither affirm nor reverse the judgment but will remand the case back to the Appellate Court, with directions to that court to file an opinion stating distinctly the ground upon which its judgment is based. As we have before stated, if the judgment is based upon the failure of appellants to comply with the rules of the court in the presentation of the case there is nothing for us to review. If the judgment is based upon a consideration of the case, an opinion should be filed giving the reasons for the decision and judgment.

Remanded to the Appellate Court.

DAVID MCCOMB, Appellee, vs. ESTHER MCCOMB, Appellant.

Opinion filed October 26, 1909.

1. *DIVORCE—wife granted a divorce for desertion cannot complain that it was not granted for cruelty.* A wife who has been granted a divorce upon the ground of desertion has no substantial ground to complain, on appeal, that the trial court erred in not decreeing that she was entitled to a divorce for extreme and repeated cruelty, even though there is evidence in the record tending to sustain such charge.

2. *DEEDS—party claiming deed was conditional has burden of proof.* One claiming that a deed in the usual form of warranty deed, without restrictions or reservations except the clause relating to payment of taxes, was conditional and that it was not to take effect or be recorded until his death, has the burden of proving such contention.

3. *SAME—what tends to show that a deed was unconditional.* The facts that a deed joined in by husband and wife, conveying property to the wife, contained a clause providing that the latter should pay taxes for the current year, and that the husband subsequently made repeated offers to the wife to trade property in which he had unquestioned title for that conveyed by such deed, tend to show that the deed was unconditional rather than that it was to be of no effect unless the husband failed to recover from the illness he was suffering from when the deed was made.

4. *SAME—fact that party is dissatisfied with his act in deeding property is not ground for setting deed aside.* The fact that one who has executed a deed voluntarily for what he then regarded as sufficient consideration, and without fraud or coercion on the part of the grantee, subsequently decides that the transaction was inequitable is not ground for setting aside the deed in equity.

5. *SAME—when court will hold a deed to have been delivered.* A court of equity will hold that a deed was delivered where the acts of the grantor and all the attending circumstances are such as to show that the deed was made by him to his wife in the nature of a voluntary settlement in view of their probable separation, and that he intended to relinquish all control over the deed.

APPEAL transferred from the Branch Appellate Court for the First District;—heard in the Superior Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding.

On November 10, 1906, appellee, David McComb, filed a bill for divorce against appellant, Esther McComb, in the superior court of Cook county. It is alleged in the bill that appellant and appellee were married in Chicago on the 19th of December, 1892, and lived together as man and wife from the time of their marriage until the 6th day of June, 1904, when appellant willfully and without cause deserted appellee and refused to return and live with him, without any fault on his part, and that there were no children born of said marriage. It is further alleged that at the time of the marriage appellee was the owner of lot 3 and the south 30 feet of lot 2, in block 37, in the subdivision known as Rogers Park; also the north 76.4 feet of lot 2, in block 10, in John Johnson, Jr's., addition to Austin, all in Cook county, Illinois; that on the 30th day of August, 1902, appellee, being in ill-health and fearing that he might not survive the illness with which he was then afflicted, executed and delivered in trust to appellant a warranty deed conveying to her the premises above described, upon the express condition agreed to by both parties that the deed was not to be recorded or used by appellant and that the property was not to be hers in fact unless appellee should not survive the illness from which he was then suffering, and in the event that he recovered, the deed was to be returned to him and canceled. It is further alleged that appellee departed from Chicago for the west on the first of October, 1902, and on the day following, appellant caused said deed to be recorded without the knowledge or consent of appellee and in disregard of the agreement and in violation of the trust upon which the same was executed and delivered. The bill prays for a divorce and that appellant be compelled to convey to appellee the property heretofore described.

On the 24th of December, 1906, appellant filed her answer, admitting the marriage as alleged in the bill but denying that she and appellee had lived together until June 6,

1904, and alleging that the separation took place on the 13th of October, 1902. The answer charges desertion for a period of two years, drunkenness and cruelty on the part of appellee, and sets out in detail several acts of violence which it is alleged he committed and threats which he made to take the life of appellant. It is alleged in the answer that appellee is a strong, able-bodied man and is in receipt of a weekly income of \$16.80; that he was the owner of the south 125 feet of lot 1, in block 3, in John Johnson, Jr.'s, addition to Chicago, worth \$2500; that he had \$700 in bank, and that he was well able to support appellant but had failed and refused to do so. It is denied that appellant deserted appellee, as alleged in the bill, and it is charged that while appellant and appellee were living together as husband and wife in the property owned by appellant at the time of her marriage and where she still resides, appellee, on October 13, 1902, deserted her without cause, stating at the time that he was going away never to return and refusing to inform her of his destination. The answer admits the execution and delivery of the deed conveying the aforesaid property to appellant but denies that appellee was in ill-health at the time and that it was made upon any agreement or trust as alleged in the bill, and alleges that the deed was executed and delivered unconditionally, appellee saying at the time that he was going away; that he had not treated appellant right; that this property so deeded would partly pay her for the time she had lost and money she had advanced on his account, and that he would keep the other property which he owned, and the bank account, for himself. It is charged that at the time of his marriage appellee was not the owner of the above described property, as alleged in the bill, but that it was then only partly paid for and encumbered by a mortgage; that since her marriage appellant had contributed from her private funds toward the purchase price of the said property the sum of at least \$1000. The recording of the deed is admitted, but it is de-

nied that it was done contrary to any agreement and without the knowledge of appellee, and it is admitted that the appellant refuses to re-convey said property to appellee and claims that it is her own.

Replication was filed to this answer, and on January 7, 1907, appellant filed her cross-bill, in which substantially the same allegations are made as to the property as set forth in her answer, and charging appellee with desertion, cruelty and non-support and praying for a divorce and alimony. Appellee answered the cross-bill, admitting the marriage and denying its other material allegations.

After replication was filed the cause was submitted to the chancellor, and on a hearing a decree was entered dismissing the original bill, finding that the charge of desertion as alleged in the cross-bill had been sustained by the evidence and granting a divorce to the appellant on that ground. The decree further found that at the time of the marriage appellant was seized of certain property in her own right, and it was adjudged and decreed that she should hold the same free and clear from any dower or other title or interest therein of appellee. As to the property conveyed to appellant by the warranty deed of appellee, it was decreed that she retain the north 76.4 feet of lot 2, block 10, in John Johnson, Jr's., addition to Austin as her separate property, in lieu of alimony, free and clear of dower or other interest of appellee, and that she re-convey to appellee lot 3 and the south 30 feet of lot 2, block 37, of Rogers Park, the same to be the separate property of appellee, and that he hold this property, and the other real estate he owned, free and clear of dower or other interest therein of appellant. From that decree appellant prosecuted an appeal to the Appellate Court. That court affirmed the decree in part and reversed it in part. From the judgment of the Appellate Court appellee appealed to this court. Being of opinion a freehold was involved, this court reversed the judgment of the Appellate Court and remanded the case to

that court with directions to transfer the cause to this court, (*McComb v. McComb*, 238 Ill. 555,) which has accordingly been done, and the case stands here as an original appeal from the superior court.

FRANCIS E. CROARKIN, for appellant.

JAMES B. DEVITT, and ROBERT W. DUNN, for appellee.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

Appellant contends the court erred in decreeing that she convey to appellee the Rogers Park property; also in not decreeing that she was entitled to a divorce on the ground of extreme and repeated cruelty. Appellee insists on an affirmance of the decree as being equitable and just under the evidence which the chancellor heard. He does not question the correctness of the decree in awarding appellant a divorce on the ground of desertion.

While there is evidence in the record tending to support the allegations of the cross-bill as to extreme and repeated cruelty, inasmuch as appellant was granted a decree for divorce on account of the fault of appellee she has no substantial ground of complaint, even if the divorce might have been granted for other causes also. This leaves as the only matter in controversy to be decided the disposition to be made of the Rogers Park property.

It appears from the evidence that at the time of the marriage of appellant and appellee he was the owner of this property and the seventy-six feet in Austin, upon all of which there was a lien for a part of the purchase price. Appellant at that time was also possessed of some real and personal property in her own right. The parties lived together, during the larger portion of their married life, in a cottage owned by appellant. She had kept boarders prior to her marriage and continued to do so a part of the time

afterward, and by this means and the use of her own property and funds she contributed substantially to the support of herself and husband, and it is clear from the evidence that at least a part of her private means was used in removing the encumbrance from appellee's property. The parties were married late in life, neither having been married before. They were not congenial, disagreed and quarreled a great deal, and as a natural result their married life was a failure. Acts of violence and manifestations of jealous rage on the part of appellee, usually caused by partial intoxication, are testified to by appellant, and she is corroborated, in part, by other witnesses. It appears that following these occasions he would deeply regret his conduct, apologize and promise that it would not occur again. On the 30th of August, 1902, both parties went together to the office of an attorney in Chicago and there jointly executed and acknowledged a warranty deed in which appellant was named as grantee, conveying to her the property in Austin and Rogers Park. Appellee insists here, and testified in the court below, that this deed was to be recorded and become effective only in case of his death, and if he recovered from the illness from which he was then suffering, the deed was to be returned to him and considered void. Appellant insists, and testified, the deed was an unconditional conveyance of the property to her, made in consideration of money advanced by her and of her time and labor which he had the benefit of.

To establish his contention that the deed was conditional the burden of proof rests upon appellee, as the deed, as executed, is in the usual form of warranty deed, containing no conditions or reservations except the clause, "subject to all taxes subsequent to those levied for the year 1901." After a careful examination of the evidence it is our opinion that appellee has not only failed to establish his contention by the burden of proof but that the weight of the evidence is against him. We are forced to the con-

clusion that this deed was executed and delivered by appellee in contemplation of a permanent separation from the appellant and as a settlement upon her or as a division of property between them, and with the idea that one of them would eventually secure a divorce. This is evidenced by his desertion of appellant a short time after the deed was made and from several letters introduced in evidence written by appellee to appellant while he was in California and Arizona. In none of these letters is any mention made of the conditions upon which he claims he deeded the property to her. In them he makes several propositions to her to trade certain property which he owned for a part of that he had conveyed to her, and from reading this correspondence no one could form the conclusion that at that time he claimed any interest whatever in the property which he sought to have her convey to him in exchange for that which he offered to convey to her. If his deed had been made upon the condition that he claims, namely, that it was only to become effective in case of his death, it is impossible to believe, from reading these letters, written several months after the deed was executed, when his health was apparently in such condition that he had no apprehension of death in the near future, that he would make repeated efforts to dispose of valuable property to which his title was unquestioned, in exchange for only a part of the land he had deeded to his wife, and which, according to his insistence, was already his own. Also the clause inserted in the deed that the grantee should pay the taxes levied subsequent to the year 1901 is repugnant to any idea but that the grantor had parted with all interest in and control over the property. This deed was executed voluntarily by appellee upon what he then regarded as sufficient consideration, without fraud or coercion on the part of appellant. He was satisfied with the settlement at the time, and because he later decided that it was inequitable and to his disadvantage is no reason why a court of equity should re-

lieve him from the consequence of his act. "Where the conduct of the grantor and all the circumstances are such as to indicate that the grantor intended to give effect and operation to the deed and to relinquish all power and control of it, the law will give effect to the deed accordingly and will hold that there has been a delivery of the same." *Shields v. Bush*, 189 Ill. 534, and cases there cited.

The decree of the superior court is affirmed in all respects except that part of it which finds appellee to be the owner of the Rogers Park property and directing a conveyance thereof to him by appellant, and to that extent the decree is reversed and the cause remanded to the superior court, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

THE CITY OF EVANSTON, Appellee, *vs.* WESLEY L. KNOX
et al. Appellants.

Opinion filed October 26, 1909.

1. SPECIAL ASSESSMENTS—*prior to passage of Local Improvement act of 1907 condemnation judgment was conditional.* Prior to the passage of the Local Improvement act of 1907 the exercise of the right of eminent domain, under article 9 of the Cities and Villages act, to acquire land for a public improvement and pay for the same by special assessment was practically the same, in the matter of the petitioner's right to discontinue the proceeding, as under the Eminent Domain act, and the judgment was conditional upon the petitioner's acceptance of the land.

2. SAME—*section 32 of the Local Improvement act construed.* Under section 32 of the Local Improvement act a judgment in a proceeding by a city to condemn land for a public improvement and pay for the same by special assessment is conditional up to the time when the petitioner, after final judgment as to all the defendants, is required to elect to enter the judgment.

3. SAME—*right of a city to dismiss condemnation proceeding after judgment.* Where, in a proceeding by a city to condemn land under Local Improvement act, judgment is rendered against

all the defendants but one and the assessment roll is ordered to be re-cast, but no judgment is ever entered on such re-cast roll although the assessment is increased, new parties are brought in and new objections filed, the city has power to dismiss the proceeding without the consent of the parties whose land is sought to be condemned.

APPEAL from the County Court of Cook county; the Hon. W. L. POND, Judge, presiding.

WELLS & BLAKELEY, and HARRY H. TALCOTT, for appellants:

The city of Evanston having elected to enter judgment on the verdict cannot delay nearly three years and then abandon the improvement. Laws of 1897, p. 112.

Where it appears that the public are not interested beneficially in the improvement, the petitioner has no right to abandon the improvement against the wishes of the parties interested who stand ready to proceed. *Ferris v. Ward*, 4 Gilm. 499; *People v. Highway Comrs.* 88 Ill. 141; *Sangamon v. Brown*, 13 id. 207; Hurd's Stat. 1908, chap. 34, par. 49.

The court has no power, after the expiration of the term, to vacate, on motion of petitioner, a judgment of condemnation or a judgment of confirmation and dismiss the proceedings and annul the binding effect of such judgment. *Railway Co. v. Chicago*, 148 Ill. 479; *People v. Noonan*, 238 id. 303.

JOSEPH L. McNAB, for appellee:

The judgment entered April 6, 1906, was not a final judgment "as to all defendants, both as to the amount of damages and compensation to be awarded and benefits to be assessed." Objections to the original roll on behalf of one defendant remained undisposed of. The re-cast roll largely increased the assessment for benefits upon the property described in the original assessment roll and no hear-

ing has been had upon it. The re-cast roll brought in additional parties defendant by assessing benefits against property not assessed in the original roll. Objections on behalf of a number of these property owners were filed to the re-cast roll and remained undetermined. No action was taken on the re-cast roll. Such being the case, the city had the right to dismiss the proceedings. Local Improvement act of 1897, pars. 26, 32; *Shurtleff v. Chicago*, 190 Ill. 473.

Mr. JUSTICE CARTER delivered the opinion of the court:

August 1, 1905, an ordinance was passed by the city of Evanston providing that the Lake Shore boulevard be opened and extended from Lee street to Main street, in said city, by condemning therefor certain lands. August 7, 1905, a petition was filed in the county court of Cook county by said city praying that steps be taken to ascertain the just compensation for the property to be taken or damaged and also as to what property would be benefited. Commissioners appointed for that purpose reported that the value of the property sought to be taken was \$10,800 and estimated that the cost of the proceedings would amount to \$500; that the title of the lands to be taken was held by Wesley L. Knox, Myron E. Cole, John W. Judkins and Edmund A. Cole. All of these persons filed objections to the assessment roll, as did others whose land was assessed for benefits. On April 6, 1906, a hearing was had in the county court as to all the objectors except Nellie G. Hollett, and a verdict rendered by the jury that the value of the property sought to be taken was \$15,000, and that the property owners, except Wesley L. Knox, were benefited to the extent of the assessment. Thereupon the court entered judgment of condemnation, and confirmed on said verdict the said assessment against all the objectors save said Nellie G. Hollett. The court, in the order of judgment, found that there was a large deficiency in the assessment,

and upon motion of the petitioner ordered that the assessment roll be re-cast except as to the properties represented by the appellants herein. June 20, 1906, the re-cast roll was filed. In this it was stated that the value of the land sought to be taken was \$15,000 and the estimated cost of the improvement \$500. The entire roll, as re-cast, increased the assessment upon a large part of the property assessed in the original roll and not taken, and also assessed benefits on property not assessed in the original assessment roll. This re-cast roll was approximately \$4200 more than the original roll. Many property owners assessed for benefits filed objections in August, 1906, to the re-cast roll. No judgment has ever been entered on the re-cast roll, and, so far as this record shows, no further steps were taken by any of the parties to this proceeding until July 9, 1908, when, through their attorneys, on notice, appellants entered a motion for a rule upon petitioner to pay for the land sought to be taken within a short day to be fixed by the court, the motion being based upon section 53 of article 9 of the Cities and Villages act. (1 Starr & Cur. Stat. p. 778.) This motion does not appear to have been called up in court by counsel until January 7, 1909, when, after a hearing, the court denied the motion on the ground that said section 53 had been repealed, by implication, by the Local Improvement act of 1897. Counsel for appellants do not now question the correctness of the court's ruling on that motion. At the time this motion was denied the petitioner offered, through its counsel, to dismiss the said proceedings, and presented to the court the draft of an order to that effect. Appellants objected to the entry of that order, and thereupon moved for the entry of an order upon petitioner to pay for the lands described in the condemnation judgment, and this motion, with that of the city to dismiss, was taken under advisement by the court. March 6, 1909, the court denied the motion of the property owners. On March 15 Frank R. Sedgwick, one of the appellants,

who was one of the objectors against whom verdict was rendered in the original assessment proceedings but whose assessment was not increased by the re-cast roll, filed a petition setting forth the failure of the city of Evanston to proceed with the assessment, and praying that the cause be set down for hearing within a short day to be fixed by the court for the settlement of the issues remaining undisposed of. Pursuant to this petition the court set said cause for final hearing March 24, 1909. On that day the court, after a hearing, entered an order, on the motion of the city of Evanston, setting aside and vacating the judgment of condemnation and confirmation entered April 6, 1906, vacating all orders entered in the cause and dismissing the case. After the entry of this last order Frank R. Sedgwick offered to proceed in said cause and make proofs upon the issues remaining undisposed of therein. This motion was denied. From the order dismissing the proceedings Wesley L. Knox, John W. Judkins, Edmund A. Cole and Frank R. Sedgwick prayed an appeal to this court, which was allowed, and Frank R. Sedgwick also prayed an appeal from the order refusing to grant his motion to proceed to try the issues undisposed of, remaining in the cause. Appeals from these two orders were taken jointly, apparently by agreement of all parties.

If the court ruled correctly in permitting the proceedings to be dismissed on motion of the petitioner, then it necessarily follows that the ruling was proper denying the motion of Sedgwick to dispose of the issues in the cause, as under such conditions there were no undisposed-of issues. The decision of this question renders necessary a consideration of various sections of the Local Improvement act with reference to the taking of private property, and especially that part of section 32 of that act, (Hurd's Stat. 1908, p. 429,) which reads: "Upon the return of a verdict in a proceeding to acquire property for a public improvement, if no motion for a new trial be made, or if made,

then if overruled, the petitioner shall within ninety days after final judgment as to all defendants, both as to the amount of damages and compensation to be awarded and benefits to be assessed, elect whether it will dismiss said proceeding or enter judgment on said verdict. If it shall elect to enter such judgment, it shall become thereby bound and liable to pay the amount thereof, whether such assessment be collected or not, and such judgment or condemnation shall not be conditional. Petitioner shall not thereafter be permitted to withdraw from such proceeding, or to dismiss the same, without the consent of all parties whose land is thereby condemned, except as hereinafter provided," etc.

Appellants insist that the judgment against their property taken April 6, 1906, is the final judgment as to them which is referred to in the first part of said section 32, and that the petitioner, not having acted in ninety days after the entering of such judgment, is thereby bound and liable to pay the amount of such judgment. They concede that under the law in force before the Local Improvement act was enacted the condemnation judgment was conditional, but they also insist, under the authority of *Chicago, Rock Island and Pacific Railway Co. v. City of Chicago*, 148 Ill. 479, that, according to both the former and present statutes, after judgment of condemnation was entered the proceeding could not be abandoned by the city. Counsel misapprehend that decision. When the Cities and Villages act was passed, in 1872, said section 53 of article 9, heretofore referred to, did not in any way refer to the time when possession should be taken, and construing that section in connection with sections 14 and 15 of the same article, this court considered at length the rights of the petitioner and the property owners in *City of Chicago v. Barbian*, 80 Ill. 482. That was a *mandamus* proceeding to compel the city to levy and collect a tax for the payment of a sum ascertained and reported by a jury as the amount of compensation

allowed for condemnation after the city had discontinued all proceedings with reference thereto. It was there held that the condemnation verdict of the jury was conditional, and this court stated (p. 485): "The compensation to be made is for 'property taken or damaged,' and no property shall be taken or damaged until compensation shall be made. The rights of the parties are correlative and have a reciprocal relation, the existence of the one depending on the existence of the other. When the party seeking condemnation acquires a vested right in the property the owner has a vested right in the compensation; but since no vested right can be acquired in the property, without the owner's consent, until compensation shall be paid, it must follow there can be no vested right in the compensation until after the amount is paid. * * * In answer to the suggestion of evil that might result from having such a judgment suspended indefinitely over property, it is sufficient to say no such result need follow. Unless the condition should be complied with within a reasonable time by the payment of the damages and the taking possession of the property condemned the proceedings would be regarded as abandoned, and a court of equity, if need be, would stay any attempt to proceed under them." It was also held in that case that proceedings for the exercise of the right of eminent domain under this statute were substantially the same on the point here in question as they were under the Eminent Domain statute. (Hurd's Stat. 1908, p. 1026.) Numerous decisions have been rendered since as to one or both of these statutes, which fully uphold the findings of the court in the case just cited. Among others are the following: *Kerfoot v. Breckenridge*, 87 Ill. 205; *South Park Comrs. v. Dunlevy*, 91 id. 49; *Schreiber v. Chicago and Evanston Railroad Co.* 115 id. 340; *City of Chicago v. Hayward*, 176 id. 130; *Chicago, St. Louis and Western Railroad Co. v. Gates*, 120 id. 86; *Commissioners of Highways v. Jackson*, 165 id. 17; *Chandler v. Morey*, 195 id. 596.

To obviate the evils urged as resulting under the workings of the former statute, said section 53 of article 9 was amended in 1891, providing that the city or village must take possession of the land condemned within two years from the entry of judgment, otherwise the property owner could, on motion, after the expiration of the two years, have the proceedings dismissed as to his property, (*Harris v. City of Chicago*, 162 Ill. 288,) but the city could not dismiss after two years without the consent of the property owners. (*Pearce v. City of Chicago*, 169 Ill. 631.) By the Local Improvement act of 1897 it was attempted, through specific provisions, to cover fully this subject so as to protect the interests of both petitioner and property owners, and at the same session of the legislature section 10 of the Eminent Domain act was also amended so as to give the property owners some remedy if their property was not taken after condemnation. See *Chicago and Western Illinois Railroad Co. v. Guthrie*, 192 Ill. 579.

Are the judgments of condemnation under the Local Improvement act conditional at any time after they are entered? It will be noted in section 32 that it is stated that if the petitioner shall elect, "within ninety days after final judgment as to all defendants, both as to the amount of damages and compensation to be awarded and benefits to be assessed," to enter such judgment, "such judgment or condemnation shall not be conditional." Up to the time of such election evidently the law intended that the judgment should be conditional. The wording of the various sections of the Local Improvement act controlling the condemnation of private property by municipalities and the payment therefor by special assessment indicates that it was the intention of the legislature to provide that the judgment should not be considered final, so that it could not be abandoned by the municipalities until judgments had been obtained as to all the defendants, including those owning property and those who were assessed as to benefits, with

certain exceptions which do not bear on the present question. Some light is thrown on the meaning to be given to the phrase "final judgment," in the first part of said section 32, by the last sentence in section 26 of said Local Improvement act, which reads: "But no final judgment shall be entered as to any of the property embraced in said roll until all the issues in the case have been disposed of, including revised or re-cast rolls, if any." There could be no final judgment as to all the defendants in these proceedings, as intended by said section 32, until the judgment had been entered upon the re-cast roll. The decision of this court in *Shurtleff v. City of Chicago*, 190 Ill. 473, supports this conclusion. There never having been any final judgment as to all the parties, either in the original proceedings or under the re-cast roll, as provided in said section 32, the petitioner, under that section, had the right to dismiss the same without the consent of the parties whose land was sought to be condemned.

This court, in *People v. Noonan*, 238 Ill. 303, and the other cases cited therein, construed sections of the Local Improvement act which referred to judgments for confirmation in special assessments where no private property had been taken or damaged for said local improvement. Those decisions are not in point, as contended by counsel, as to the construction of the sections of the statute here under discussion.

The legislature having provided under what circumstances the city can dismiss condemnation proceedings, this court must be governed by such legislative enactment. If the provisions of that enactment do not properly protect the property owners, that is a question for the legislature and not for the courts. Whether the property owners can recover by a proper action, under the rules laid down by this court in *Winkelman v. City of Chicago*, 213 Ill. 360, we do not decide, as that question is not before us.

The judgment of the county court will be affirmed.

Judgment affirmed.

ROBERT W. SHERIDAN, Appellee, vs. THE PEORIA RAILWAY COMPANY, Appellant.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*Supreme Court cannot consider question of amount of damages in a negligence case.* The amount of damages in an action for personal injury is purely a question of fact finally settled by the judgment of the Appellate Court and not subject to review in the Supreme Court.

2. SAME—*appellee is entitled to damages if appeal was taken only for delay.* Where the only question raised either in the Appellate Court or the Supreme Court is that the damages awarded in a personal injury case were excessive the appeal to the Supreme Court must be regarded as taken only for delay, and the appellee is entitled, under the statute, to damages on the amount of the original judgment.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

PINKNEY & McROBERTS, and JOSEPH A. WEIL, for appellant.

DAILEY & MILLER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Robert W. Sheridan, recovered a judgment for \$2500 in the circuit court of Peoria county against the appellant for damages resulting from injuries charged to have been caused by negligence of the appellant. An appeal was taken to the Appellate Court for the Second District, and appellant by its brief and argument sought a reversal on the sole ground that the damages awarded were excessive. The judgment was affirmed by the Appellate Court, and a further appeal was prosecuted to this court.

The appellant has filed in this court the same brief and argument which was filed in the Appellate Court. No proposition of law is presented by the brief or argument, and the whole complaint is, that the amount awarded by the jury as damages, and for which the judgment was rendered, is greater than actual damages suffered by the appellee. After presenting the views of counsel on that subject the argument concludes in the same words addressed to the Appellate Court, as follows: "We therefore urge that this honorable court by its order will either compel appellee to enter a reasonable *remititur* consistent with the damages sustained, or that a reversal of the case be entered because of the excessive judgment obtained."

The amount of damages caused by the negligence of the appellant was purely a question of fact finally settled by the judgment of the Appellate Court and not subject to review in this court. The appellant, in prosecuting its appeal, could not have been ignorant of the nature of that question, which has been decided in a great number of cases running through the Reports, from *Wabash, St. Louis and Pacific Railway Co. v. Peyton*, 106 Ill. 534, down to and including *Smith v. Chicago, Peoria and St. Louis Railway Co.* 236 id. 369. No other question was raised in the Appellate Court and none is raised here. The conclusion is inevitable that an appeal taken on a ground which this court could not consider must have been taken for delay, and under section 23 of chapter 33 of the Revised Statutes the appellee is entitled to damages on the amount of the original judgment.

The judgment of the Appellate Court is affirmed, with ten per cent damages on the amount for which the judgment of the trial court was rendered.

Judgment affirmed.

THE PEOPLE *ex rel.* William Schaumleffel, Plaintiff in Error, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, Defendant in Error.

Opinion filed October 26, 1909.

1. **MANDAMUS**—*a writ will be awarded only when clear case is made.* A writ of *mandamus* will be awarded only where the party applying for the writ shows a clear right to it and a clear legal duty on the part of the defendant to perform the act sought to be enforced.

2. **SAME**—*when question of unlawful consolidation of railroads cannot be inquired into.* Whether the acts of a railroad company in making and carrying out a contract for the use of another company's tracks between certain points amount to an unlawful consolidation, control and operation of a parallel and competing line is a question which can be raised only by the State in a direct proceeding to forfeit the franchise, and cannot be raised in a *mandamus* proceeding to require the company to run passenger and freight trains over its original line, in both directions, between certain points, to accommodate the relator and his neighbors.

3. **RAILROADS**—*what does not amount to a re-location of a railroad.* Where a double track is necessary for the proper handling of a railroad company's business between certain points and the nature of the country makes it practically impossible to build a second track paralleling the original line so as to safely handle passengers and freight in both directions between such points, the making of an arrangement for the use of another company's tracks between such points for the purpose of handling part of the lessee's business is not an unlawful re-location of its railroad.

4. **SAME**—*railroad has certain discretion in operating its road.* A railroad company has a certain discretion in the management of its road and the running of its trains, and while it is to some extent subject to control by the courts, the courts have no power to interfere unless it appears that the company is not complying with its duty, under the law, as a common carrier.

5. **SAME**—*a company will not be required to provide facilities for demands that may never exist.* A railroad company will not be compelled by the courts to furnish facilities to the relator not shown to be necessary to supply any existing want or demand but merely to anticipate needs that may arise at some future time if the relator should develop a coal mine on his land and create a necessity for such facilities.

6. SAME—*what is not ground for compelling a railroad to run trains in both directions on original line.* Where a railroad company, owing to the steepness of grades, operates trains in only one direction between certain points on its original line and uses another line for other trains, the fact that there is no public road for part of the intervening three-fourths of a mile between the depots on the respective lines at a certain station does not require that the company be compelled to run trains in both directions on the original line to accommodate people living nearer to the depot on that line than to the depot on the other line.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding.

Plaintiff in error filed a petition for *mandamus* in the circuit court of St. Clair county, alleging that the St. Louis, Alton and Terre Haute Railroad Company, a corporation organized under the laws of this State, owned or controlled and operated a railroad from the city of East St. Louis to the city of Belleville, in St. Clair county, Illinois, from the year 1855 until 1896, and during said time ran freight and passenger trains in both directions over said road; that there was a station established on said railroad called Ogle, where passengers were received and discharged by all regular trains running both ways. It is alleged that in 1896, by means of a contract or agreement, the defendant in error obtained control of said line of railroad and since then has operated the same; that since the year 1898 it has ceased to operate said railroad according to the usual methods of operating railroads, and that the service to the public upon the said railroad is only in one direction, no passenger or freight trains being run from East St. Louis to Belleville; that the said Ogle station is still maintained by defendant in error for the purpose of receiving and discharging passengers to and from its trains operated in one direction only, and that but one train stops there daily, and it runs

from Belleville to East St. Louis. It is further alleged that plaintiff in error is the owner of and resides on a large tract of land lying about one hundred yards from Ogle station; that he, with the general public, is interested in having the trains on said railroad run in both directions and to receive and discharge passengers at said station; that if trains on said railroad ran both ways and passengers were received and discharged at Ogle station, he and several hundred other residents of that vicinity would frequently have occasion to travel on said railroad, but as it is now operated they are deprived of the use and accommodation of the railroad, which it is the duty of defendant in error to furnish; that he is now compelled to go a mile in order to take a train or car, while he would only have to go one hundred yards if defendant in error operated its railroad in a proper manner. It is further alleged that there is an eight-foot vein of coal underlying the land of plaintiff in error, which, when raised to the surface of the ground, would be worth \$500,000; that because of the failure of the defendant in error to run its trains toward the city of Belleville from East St. Louis, loaded cars are not drawn in that direction and empty cars are not returned from East St. Louis, and thereby the shipping of coal in either direction is greatly hindered, the business of opening and operating a coal mine on said tract of land prevented and the value of said coal to plaintiff in error practically destroyed; that a coal mine on said tract of land would be an industry of vast interest to the general public as well as to plaintiff in error. It is alleged that it is the duty of defendant in error, under the law, to run its trains both ways on said railroad and to receive and discharge passengers at said Ogle station, and unless it is compelled by *mandamus* to so operate its trains it will continue to operate them as it now does and as above set forth. The petition prays for a writ of *mandamus* directed to defendant in error, commanding it to operate regular and proper trains, both freight and

passenger, over said railroad in both directions between the cities of East St. Louis and Belleville, and that it stop its passenger trains to receive and discharge passengers at said Ogle station.

The defendant in error answered the petition, admitting that the St. Louis, Alton and Terre Haute Railroad Company formerly operated the railroad in question between the cities of East St. Louis and Belleville and during said time it carried passengers and freight in both directions between said cities; that since about the year 1895 said railroad had been operated by defendant in error, and while so operated trains had been run and passengers and freight transported in but one direction,—that is, from Belleville to East St. Louis. The answer denies that plaintiff in error or the People of the State of Illinois have any interest in having trains operated or freight and passengers carried in both directions between said cities or that they are injured thereby, and denies that plaintiff in error is entitled to the relief demanded. It is then alleged that in May, 1896, the defendant in error entered into a contract with the St. Louis, Belleville and Southern Railway Company, a corporation organized under the laws of this State, which was then the owner and operator of a railroad running from the city of East St. Louis to the city of Belleville, whereby defendant in error acquired the right to run its trains over the tracks of said Southern Railway Company between said cities, and by virtue of said contract it has since that date operated its passenger and freight trains running from East St. Louis to Belleville over the tracks of said Southern Railway Company. It is further alleged that Belleville is about fourteen miles from East St. Louis, and that from East St. Louis to the station of Church, a point about midway between said cities, said railroad lines run parallel, and at no place between East St. Louis and the station of Church are said railroad lines more than three hundred feet apart; that about one-half mile east of said station of Church there are

high bluffs, over which it is necessary to pass in going from East St. Louis to Belleville, and it is impossible to construct a railway line between said station of Church and the city of Belleville on a direct line so that passengers and freight can be safely moved between said points, and it is necessary in the construction of said railway line over the aforesaid bluff to some extent to wind the bluff for the purpose of securing a proper and suitable grade. It is further alleged that defendant in error, after acquiring the use of the railway line of the St. Louis, Alton and Terre Haute Railroad Company between the said cities of Belleville and East St. Louis spent a large amount of money in the improvement of said line, so that its trains might be operated with safety and it thus be able to discharge its duties and obligations as a common carrier; that after said improvement had been made defendant in error ascertained that said line between the station of Church and the city of Belleville could not be constructed so a suitable grade could be had and passengers and freight could be moved over said line in both directions, and it thereby became necessary to enter into the contract with the Southern Railway Company above mentioned. It is alleged that after entering into said contract defendant in error expended a large amount of money in the improvement of the line of said railway company between the cities of Belleville and East St. Louis, so that it might meet the demands of the public desiring to transact business and might discharge its duties and obligations as a common carrier; that after it had improved the line of said Southern Railway Company between said cities a suitable grade was acquired between the station of Church and the city of Belleville over which trains could be moved with safety. It is alleged that at the time of entering into the contract with the Southern Railway Company aforesaid, it was and has since been necessary for the defendant in error to operate a double line of railway tracks between the said cities of Belleville and East St. Louis in

order to meet the demands of its business, operate its trains with safety and discharge its duties and obligations as a common carrier, and that since said lines have been so improved freight and passengers can be safely carried from Belleville to East St. Louis over the line of the St. Louis, Alton and Terre Haute railroad and from East St. Louis to Belleville over the line of the St. Louis, Belleville and Southern Railway Company. It is further alleged that the station at Ogle, mentioned in the petition, on the line of the St. Louis, Alton and Terre Haute railroad, is three miles in a south-easterly direction from the station of Church; that it is only a flag station and no agency is maintained there, and that there is a similar station of the same name maintained on the line of the Southern railway about three-quarters of a mile directly south of the said station of Ogle on the St. Louis, Alton and Terre Haute railroad, and that plaintiff in error and the people living in the neighborhood of said stations are provided with ample railroad facilities, and are not deprived of any right or convenience by reason of the trains being operated on said railroad lines as above set forth; that defendant in error could not maintain a regular station at Ogle and could not operate trains in both directions on the said line formerly owned by the St. Louis, Alton and Terre Haute Railroad Company with profit to itself, and that the demands of plaintiff in error and people living in the vicinity of Ogle do not require that such a station be maintained there and that trains be so operated on said line of railroad. It is further alleged that defendant in error has been operating its trains as above set forth for more than five years prior to the filing of this petition, and that if plaintiff in error ever had any cause of complaint he is barred by the Statute of Limitations. It is alleged that the action was commenced without notice of any kind to defendant in error. A special plea of the Statute of Limitations was also filed by defendant in error.

Plaintiff in error filed a replication denying all the material allegations of the answer, and further set up that the St. Louis, Belleville and Southern railway was, at the time defendant in error began to operate it, a parallel and competing line with the line of railway then and there owned, operated and controlled by defendant in error between said cities of Belleville and East St. Louis, and was engaged in a general railroad business between said points in competition with said railroad of defendant in error, and that since entering into said contract defendant in error has wholly controlled said Southern railway and destroyed all competition between said railways. Plaintiff in error also filed a replication to the special plea of the Statute of Limitations of defendant in error. A demurrer to the replications was overruled, and on a trial before a jury a verdict was returned in favor of defendant in error. Judgment was rendered on the verdict and the plaintiff in error took the case to the Appellate Court by writ of error, where the judgment of the circuit court was affirmed, and this writ of error is sued out of this court to review the judgment of the Appellate Court.

H. E. SCHAUMLIEFFEL, for plaintiff in error.

KRAMER, KRAMER & CAMPBELL, (JOHN G. DRENNAN, of counsel,) for defendant in error.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court:

Plaintiff in error says in his brief three questions are presented by this record: "First, does the defense set up constitute a re-location of defendant in error's railroad? Second, does the defense set up constitute the consolidation, control and operation of a parallel and competing line? Third, is the interest set up sufficient to maintain this action?"

Defendant in error's witnesses testified that a single line of track between the cities of East St. Louis and Belleville was insufficient to enable defendant in error to handle the business between those two cities in such manner as would accommodate the public and discharge its duties as a common carrier; that the building of another line next to and parallel with the St. Louis, Alton and Terre Haute track was, on account of high bluffs south of the station of Ogle, through which said railroad passed, impracticable if not impossible, and for that reason the defendant in error entered into a contract with the Southern Railway Company by which it secured the right to run its cars over said railway company's track from East St. Louis to Belleville; that since said contract was entered into defendant in error has run its trains from Belleville to East St. Louis over what was formerly the St. Louis, Alton and Terre Haute track and from East St. Louis to Belleville over the Southern railway track. Said two railroad tracks run parallel with each other and not over three hundred feet apart at any place from East St. Louis to Church station, which is about one-half way between East St. Louis and Belleville. Ogle station, where plaintiff in error resides, is on the line formerly known as the St. Louis, Alton and Terre Haute railroad, about three miles south-easterly from Church, which is the direction towards Belleville. At Ogle station the Southern railway track is about three-quarters of a mile from the St. Louis, Alton and Terre Haute track, and another station, also called Ogle, is located on said Southern railway. At no place between said cities of East St. Louis and Belleville are the said tracks further apart than three-quarters of a mile.

The jury found, in answer to a special interrogatory, that a double track was necessary for the transaction of the business of the defendant in error as a common carrier between the cities of East St. Louis and Belleville. A number of witnesses on behalf of defendant in error, ex-

perienced in railroad construction, maintenance and management, testified that it was not practicable to construct another track alongside the line of the St. Louis, Alton and Terre Haute track. This latter proposition was disputed by plaintiff in error, but all controverted questions of fact were conclusively settled by the judgment of the Appellate Court. The question then arises whether, under the facts, a re-location of defendant in error's railroad is presented. We think this must be answered in the negative. (*Chicago and Alton Railroad Co. v. People*, 152 Ill. 230.) In that case this court cited with approval *People v. Rome, Watertown and Ogdensburg Railroad Co.* 103 N. Y. 95, and formulated the rule announced in that case in the following language: "Where a railroad company is the owner of two lines of road between the same points, and can substantially perform its duty to the people of the State by operating one of them exclusively for through trains and the other for local trains without serious detriment to any considerable number of people and with more advantage and convenience to a greater number of people, it will not be compelled, by *mandamus*, to operate both for local trains, where such operation of both will entail great loss and expense on the company without any return; and would also be violative of the rule that everywhere obtains, that a *mandamus* will never be awarded where the right to it is doubtful and not clear."

The second contention, that the facts proven show the consolidation, control and operation by defendant in error of a parallel and competing line, contrary to law, is not one that can be raised by plaintiff in error in this proceeding. This identical question as to these same two lines of railroad was passed upon by this court in *Thomas v. St. Louis, Belleville and Southern Railway Co.* 164 Ill. 634. In that case the Southern Railway Company filed its petition to condemn right of way across certain lands, which was resisted by the land owner. The court said (p. 639): "The

defendants then offered to prove that the railway of petitioner was a parallel line to the Cairo Short Line railroad from East St. Louis to Belleville and that both lines were operated by the Illinois Central Railroad Company. There was no offer to show that the franchises of petitioner had been forfeited, and the court refused to admit the offered evidence. It was sufficient for the purpose of the proceeding that the petitioner was a body corporate *de facto*. (*McAuley v. Columbus, Chicago and Indiana Central Railway Co.* 83 Ill. 348.) While it retained its franchise the question whether or not it was improperly exercising such franchise was one between it and the State. Any question of illegal combination or arrangement entered into by it that might affect the franchise could only be raised by the People in a proceeding instituted for that purpose.—*Hudson v. Green Hill Seminary*, 113 Ill. 618; *Barnes v. Suddard*, 117 id. 237; *American Trust Co. v. Minnesota and Northwestern Railroad Co.* 157 id. 641.”

The principal part of plaintiff in error's argument is devoted to the third proposition above quoted. It is argued that by reason of the fact that trains are run over the St. Louis, Alton and Terre Haute track in one direction only, empty coal cars cannot be delivered at Ogle station on said line sufficient for the needs of the plaintiff in error to move the coal underlying his land if a coal mine should be opened thereon, and in that manner the development of a coal mine at that place is prevented. In the first place, we do not think plaintiff in error has any right to compel the operation of trains and the handling of cars not shown to be reasonably necessary to meet any existing wants but in anticipation of needs that might arise at some future time if he should develop a coal mine and create the necessity for cars. A railroad company has some discretion in the management of its road and the running of trains thereon, and while it is to some extent subject to control by the courts, the courts have no power to interfere unless it

appears that the railroad company is not at the time complying with its duty, under the law, as a common carrier. This duty does not require the railroad company to provide facilities to meet demands that do not and may never exist. (*People v. Illinois and St. Louis Railroad and Coal Co.* 122 Ill. 506.) Moreover, defendant in error's proof showed that shippers along both lines of the railroad between the city of Belleville and Church station were served with empty cars by switch engines from Belleville as well or better than they could be by a train service both ways on each line.

We see no basis for plaintiff in error's claim of right to the writ to compel defendant in error to provide facilities for the transportation of passengers in both directions on its St. Louis, Alton and Terre Haute line. Persons residing at Ogle station on that line are within three-quarters of a mile of the station on the line of the Southern railway, which is reached over part of the way by a private road. It is insisted because there is no public road between the two stations that additional passenger service should be provided. To say the least, there is no greater obligation resting upon the railroad company to provide additional passenger service on that account than there is upon the residents on the St. Louis, Alton and Terre Haute line to provide a public road to enable them to reach the station of the same name on the Southern line. At any rate, no public need is shown for such additional passenger service. A writ of *mandamus* will be awarded only in cases where the party applying for the writ shows a clear right to it and a clear legal duty on the part of the defendant to perform the act sought to be enforced. *People v. Rose*, 211 Ill. 252; *People v. Glann*, 70 id. 232; *People v. Johnson*, 100 id. 537; *Swigert v. County of Hamilton*, 130 id. 538; *People v. Dulaney*, 96 id. 503.

We find no error of the trial court in its rulings admitting and rejecting testimony or in giving and refusing in-

structions. The rulings in these respects were in harmony with the law governing the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. LLOYD Z. JONES, Plaintiff in Error.

Opinion filed October 26, 1909.

1. **MALICIOUS MISCHIEF**—*an intent to kill animal need not be proved.* To sustain a conviction for malicious mischief under section 203 of division 1 of the Criminal Code, relating to killing, maiming or wounding of domestic animals, it is not necessary to prove that the animal was killed or injured by the defendant with intent to destroy its life, as the words "with the intent that the life of the animal shall be destroyed thereby" refer only to the exposing of poisonous substances.

2. **SAME**—*malice toward owner of animal must be proved under section 203.* To sustain a conviction for malicious mischief under section 203 of division 1 of the Criminal Code, relating to the killing, maiming, wounding or poisoning of animals, it is necessary to show that the defendant was actuated by malice toward some person, ordinarily the owner of the animal, but it need not be shown that the offender knew who owned the animal or that he had ever said or done anything to indicate malice toward such owner. (*Snapp v. People*, 19 Ill. 80, explained.)

3. **SAME**—*inference of malice is one of fact for jury.* Malice may be, and frequently must be, inferred from the nature of the act itself and from the circumstances which accompany and characterize it, but the inference is not one of law for the court but one of fact for the jury.

4. **SAME**—*cruelty to animals is distinct from the offense of malicious mischief.* Since the revision of the Criminal Code in 1874 the offenses of cruelty to animals and of malicious mischief in killing or maiming a domestic animal are entirely distinct, the former offense having relation primarily to the suffering of the animal itself, and the latter relating chiefly to the injury to the owner of the animal, whoever he may be, by destruction of his property.

5. **SAME**—*proof that killing of animal was "absolutely" necessary to protect defendant's property is not required.* In a mali-

cious mischief prosecution, under section 203 of division 1 of the Criminal Code, for castrating a bull, an instruction requiring the jury to believe that the defendant's act was "absolutely" necessary for the protection of his property imposes a more stringent rule of conduct than is required by the doctrine of self-defense in cases of homicide, and is erroneous.

6. *SAME—right of a person to protect his property.* The inherent right of a person to protect his property is the right to do whatever, under the circumstances of the particular case, is apparently reasonably necessary for its defense; but the same rules do not apply as govern the defense of one's life, and the reasonableness of the force used depends in some degree upon whether the offense is against an animal or a human being.

7. *EVIDENCE—what evidence admissible on question of defendant's motive.* In a malicious mischief prosecution for castrating a bull which the defendant discovered in his pasture among his herd of another breed of registered cows, proof that when a cow once produces a cross-breed calf she has a tendency to cross-breed ever afterwards tends to show the seriousness of the injury to the defendant as a breeder of full-blood cattle, and is admissible as bearing upon his motive in castrating the bull.

8. *SAME—what is admissible as tending to show want of malice.* In a malicious mischief prosecution for castrating a bull which had attacked defendant after he had got it into his stable, proof that a bull which has once attacked a man will have the habit, for a long time, of attacking the same man and that the only known remedy is to castrate the bull, is admissible for the purpose of showing want of malice by the defendant.

9. *SAME—any evidence fairly tending to show want of malice is admissible.* Even if a person does an act willfully or wantonly for the purpose of injuring an animal, it does not necessarily follow that he did it with malice toward the owner, and in such a case the question of malice toward the owner is the crucial point, and any evidence fairly tending to show lack of such malice by the defendant is admissible.

10. *VERDICT—when a verdict in malicious mischief prosecution is excessive.* A verdict imposing a fine of \$550 and costs in a malicious mischief prosecution for castrating a bull is excessive and in violation of the provision of the bill of rights that "all penalties shall be proportioned to the nature of the offense," where the evidence tends to show that the bull was worth only about \$40 and that the castration was done in the ordinary way, without unnecessary injury to the animal, which became an ordinarily healthy and valuable steer.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding.

N. F. ANDERSON, JAMES H. ANDREWS, and THOMAS J. WELCH, for plaintiff in error:

If malice against the owner of the animal killed or injured is the *gravamen* of the offense it must be proved. It has not been proved in this case. *Calef v. Thomas*, 81 Ill. 482; *Rex v. Austen*, R. & R. C. C. 490; *Rex v. Pierce*, 1 Leach's C. C. 527; *Hean's case*, 1 id. 527; *Rex v. Sheppard*, 2 id. 490; 2 East's Pleas of the Crown, 1072; *State v. Landreth*, 4 N. C. 446; *State v. Robinson*, 3 Dev. & B. 130; *State v. Lathan*, 13. Ired. 33; *State v. Wilcox*, 3 Yerg. 278; *Wright v. State*, 30 Ga. 325; *State v. Pierce*, 7 Ala. 730; *Northcutt v. State*, 43 id. 330; *Hobson v. State*, 44 id. 380; *Johnson v. State*, 61 id. 9; *Thomas v. State*, 30 Ark. 433; *Chappell v. State*, 35 id. 345; *United States v. Giden*, 1 Minn. 292; 3 Chitty on Crim. Law, 1086; *Commonwealth v. Waiden*, 3 Cush. 558.

It was error for the court to refuse to admit proper evidence tending to show that the defendant was acting in good faith and without malice or under a misapprehension of his rights. 14 Am. & Eng. Ency. of Law, (2d ed.) 15; *Calef v. Thomas*, 81 Ill. 482; *Wright v. State*, 30 Ga. 325; *State v. Graham*, 46 Mo. 490; *Newton v. State*, 3 Tex. App. 245; *Branch v. State*, 41 Tex. 622; *Lott v. State*, 16 Tex. App. 206.

The defendant was justified in injuring the animal in defense of his property and person. *Thomas v. State*, 14 Tex. App. 200; *Brady v. State*, 26 S. W. Rep. 621; *People v. Kane*, 29 N. E. Rep. 1015; *Farmer v. State*, 21 Tex. App. 423; *Wood v. State*, 27 id. 586; *Lane v. State*, 16 id. 172; *Aldrich v. Wright*, 53 N. H. 398; *Taylor v. Newman*, 4 B. & S. 89; *Barrington v. Turner*, 3 Lev. 28.

W. H. STEAD, Attorney General, JUNE C. SMITH, Assistant Attorney General, and CHARLES E. STURTZ, State's Attorney, (WM. C. EWANS, of counsel,) for the People:

In an indictment for malicious mischief to domestic animals it is not necessary to charge malice against the owner of such animals. *State v. Scott*, 19 N. C. 35; *Harris v. State*, 73 Ga. 41; *Swartzbaugh v. People*, 85 Ill. 457.

Where an offense is purely statutory it is sufficient to charge the offense in the language of the statute or so plainly that the nature of the offense may be easily understood by the jury. Crim. Code, div. 11, sec. 6; *Mohler v. People*, 24 Ill. 27; *Cross v. People*, 47 id. 153; *Cole v. People*, 135 id. 410; *Commonwealth v. Brown*, 141 Mass. 78; *State v. Smith*, 46 Iowa, 662; *McKinney v. People*, 32 Mich. 284.

It is not necessary that the People should prove direct expressions of hatred or ill-will. It will be sufficient if it appears from the evidence that the act was prompted by malevolence or revenge. *Calef v. Thomas*, 81 Ill. 478.

A party may be convicted and fined for malicious mischief in wounding an animal while it was trespassing upon his field. The fact that the animal was doing damage does not justify injuring it. *Snap v. People*, 19 Ill. 80.

A party complaining of an injury has no right to do unnecessary damage to an adverse party, notwithstanding the latter is in the wrong. *Calef v. Thomas*, 81 Ill. 478; *Waterman on Trespass*, sec. 686; *Wood on Nuisances*, secs. 834-838; *Great Falls Co. v. Worster*, 15 N. H. 412.

In cases of this kind it is not necessary to prove express malice against the owner of the animal maimed. From the commission of the unlawful act malice will be presumed until the contrary appears. 2 East's Pleas of the Crown, 1074; 3 Chitty on Crim. Law, 1087; *State v. Council*, 1 Tenn. 305; *Chappell v. State*, 35 Ark. 345.

An act that is wrongfully and purposely done is, in law, maliciously done. *Brown v. Master*, 104 Ala. 464;

Thomas v. State, 14 Tex. App. 758; 19 Am. & Eng. Ency. of Law, (2d ed.) 628.

No exceptions were taken to remarks of the court, hence that objection is not preserved for review here.

Mr. JUSTICE CARTER delivered the opinion of the court:

Lloyd Z. Jones, plaintiff in error, was found guilty by a jury in the circuit court of Henry county of willfully and maliciously castrating a certain yearling bull, and was fined \$550 and costs. The Appellate Court for the Second District, on writ of error, affirmed the judgment of the trial court, and the cause has been brought here for review.

The indictment was based on section 203 of division 1 of the Criminal Code, (Hurd's Stat. 1908, p. 752,) and the part which is necessary for our consideration reads: "Whoever willfully and maliciously kills, wounds, maims, disfigures or poisons any domestic animal, or exposes any poisonous substance, with intent that the life of any such animal should be destroyed thereby, such animal being the property of another, shall be imprisoned in the penitentiary not less than one, nor more than three years, or fined not exceeding \$1000, or both,' provided," etc.

Plaintiff in error contends that under this statute, in order to sustain a conviction, it is necessary to prove that the animal was killed or injured by the defendant with intent to destroy its life. We do not agree with this contention. Under such a construction of the statute no injury of an animal could be held to be malicious mischief unless it could be proven that the person committing the act contemplated the death of the animal. The provision that the intent must be "that the life of any such animal should be destroyed thereby," refers only to the exposing of the poisonous substances, and not to the killing, wounding, maiming, disfiguring or actual poisoning.

Plaintiff in error's chief contention is, that under this provision of the statute malice towards the owner of the

property must be proved as an essential ingredient of the offense. The meaning usually attributed to the word "malicious" in criminal statutes is equivalent to "wrongfully, intentionally and without just cause or excuse." Malicious mischief or damage amounting to a crime is defined by Blackstone to be an injury done "either out of a spirit of wanton cruelty or black and diabolical revenge." (4 Blackstone's Com. *244; *Commonwealth v. Walden*, 57 Mass. 558; *Commonwealth v. Williams*, 110 id. 401). The meaning to be given the word "malicious" in criminal statutes necessarily depends quite largely upon the wording of the particular statute. By the weight of English and American authorities it is held, in construing statutes on malicious mischief similar to the one here in question, that the malice in injuring or killing animals must be directed against the owner of the property and not against the animal itself. Bishop on Stat. Crimes, (3d ed.) sec. 433; 2 East's Crown Law, 1072; *State v. Boies*, 1 Am. & Eng. Ann. Cas. (Kan.) 491, and note; 19 Am. & Eng. Ency. of Law, (2d ed.) 641, and cases cited; *Chappel v. State*, 35 Ark. 345; *State v. Pierce*, 7 Ala. 728; *Northcot v. State*, 43 id. 330; *State v. Landreth*, 4 N. C. 331; *State v. Wilcox*, 11 Tenn. 278; *Newton v. State*, 3 Tex. App. 245; Ingham on Animals, sec. 127; 2 Bishop on New Crim. Law, sec. 996; *Johnson v. State*, 61 Ala. 9.

It is argued by defendant in error that the construction put upon the statute of 1845 in *Snap v. People*, 19 Ill. 80, would indicate that this court's view then was that a person might be convicted and fined for malicious mischief for wounding an animal without proving malice towards the owner. We do not think this is a fair conclusion from the reasoning of that decision. But even conceding that view to be correct, the opinion would not necessarily be conclusive on the question here before us. That decision construed a part of section 156, division 11, of the then criminal law. (Rev. Stat. 1845, p. 179.) At that time there

was no section of the Criminal Code making it possible to find one guilty of cruelty to animals, such as is now the case. A law governing that offense was enacted in 1869, (Laws of 1869, p. 115,) and when the criminal laws of this State were revised and enacted in 1874 as our present Criminal Code, section 50 thereof (Hurd's Stat. 1908, p. 720,) provided a punishment for cruelty to animals. This section follows largely the provisions of the act of 1869. In that code comprehensive provisions were incorporated as to malicious mischief, (Hurd's Stat. 1908, pp. 749, 752,) including the section as to killing or injuring domestic animals, heretofore quoted. Cruelty to animals should not be confounded with malicious mischief. (Bishop on Stat. Crimes,—3d ed.—sec. 1100.) It is manifest that the legislature in revising and enacting the Criminal Code, in 1874, intended to distinguish clearly between cruelty to animals, having relation primarily to the suffering of the animal itself, and malicious mischief as to such animals, chiefly concerning the injury to the owner of such animal by the destruction of his property.

So far as we are advised this court has never been called upon to construe the section of the Malicious Mischief statute now under consideration. In *First Nat. Bank v. Burkett*, 101 Ill. 391, this court said (p. 394): "Malicious mischief is the wanton or reckless destruction of or injury to property. It in some cases implies a wrong inflicted on another with an evil intent or purpose, and this is the sense in which it is employed in this statute." In that case the court was discussing the meaning of the word "malice" in the Insolvent Debtor act, and what was there said as to the meaning of this word has since been quoted with approval by this court.

While some of the sections of our present Criminal Code as to malicious mischief evidently do not require that malice towards the owner must be proven as an essential ingredient of the crime, we think it was the plain intent of the

legislature that in order to prove the crime charged in said section 203 it is necessary to show that the defendant was actuated by actual malice towards the owner of the animal injured or killed, otherwise the legislature must have acted so unreasonably as to have provided that the same offense, by the same act, should be subject to two punishments: one for cruelty to animals, having the comparatively mild penalty of from \$3 to \$200, and the other under the section for malicious mischief here in question, having a fine not exceeding \$1000 or imprisonment for not less than one nor more than three years, or both. It is very evident that if malice towards the owner of the animal is not required to be proved under said section 203, then substantially the same proof would justify a conviction for malicious injury to an animal under this section as would justify a conviction for cruelty to the same animal under section 50 heretofore referred to. This surely was not the legislative intention. In order to constitute the offense of malicious mischief under this statute it is not enough to prove a spirit of cruelty toward the animal. The malice must be directed against some person, ordinarily the owner of the animal, but it need not be shown that the offender actually knew the owner. It will be sufficient to show that he was bent on mischief against the owner, whomsoever he might happen to be. (*State v. Leslie*, 138 Iowa, 104, and authorities cited; *State v. Prater*, 130 Mo. App. 348; *State v. Coleman*, 29 Utah, 417.) But it is not necessary, in order to prove malice within this rule, to show that the defendant ever said or did anything to indicate malice against the owner. Malice may be, and frequently must be, inferred from the nature of the act itself and from the circumstances which accompany and characterize it. The inference is not one of law for the court but one of fact for the jury. *Hobson v. State*, 44 Ala. 360; *People v. Olsen*, 6 Utah, 284; *Queen v. Smith*, 7 Nova Scotia, 729; *State*

v. *Churchill*, 98 Pac. Rep. (Idaho,) 853; *State v. Linde*, 54 Iowa, 139.

It is said that this case was tried in the lower court on the theory now contended for by plaintiff in error,—that is, that in order to convict the defendant the evidence must show, beyond a reasonable doubt, that he was actuated by malice towards the owner. Apparently, judged by the entire series of instructions, the trial court so construed this statute. The plaintiff in error, however, contends that even though this be true, some of the instructions were of such character, considering the nature of the evidence, that the jury were necessarily misled in their consideration of the case.

The evidence in the record is very brief. The State's case rests largely, if not entirely, upon the testimony of the plaintiff in error himself. It appears that he was a breeder of registered short-horn and other high-grade cattle, for which purpose he used a farm of some five hundred acres in Galva township, in Henry county. In one of the fields of his stock farm there were on October 25, 1905, twenty or more registered short-horn cattle belonging to him. Next to that pasture was a field used by one John Johnson as a pasture. Plaintiff in error testified that about one o'clock that afternoon he saw the bull in question in his pasture, serving one of his most valuable cows; that there was another cow of the herd in heat; that by means of salt he led the cows into the barnyard, the bull following, and then succeeded in getting the bull into a stall in the milking stable. As to what happened thereafter he testified substantially as follows: "I penned the bull up and went to town. About eight o'clock I went to the barn with a lantern. I had forgotten I had the bull in there until the light showed him in the stall. I went carefully up and reached out to catch him. When I got about six inches from his nose he went for me,—put his head down and came for me past the stanchions and struck his whole weight against the barn,

and then he recoiled quick as that and kicked me twice, and the second time kicked out the lantern. He had me in a manger. I went to the house and got another lantern. I then looked at the bull, and he was chasing around the stall trying to get at me. I then climbed on the stanchions and got a loop of rope over his horns and tried to pull his head through the stanchions, but his head and horns was so big I couldn't get it through, so I twisted the rope over the top of the stanchions. I next went down into the stall and castrated him and turned him out into the darkness. I did not know whose bull he was at that time. It was not through malice I cut and castrated the bull. I castrated him because it got to be a contest between me and the bull for the possession of the milking stable, and I was alone on a 500-acre stock farm. I had no help. It was night. My long bull rope was gone, too. I castrated the bull because I did not dare turn him out with these same cattle again, on account of the other cow being bulling." Johnson and some other witnesses testified that the day after the bull was castrated they saw plaintiff in error and he gave them substantially the same information as to what he had done with the bull. The testimony also shows that another bull belonging to Johnson had broken into plaintiff in error's pasture a few days before this, different in size and color, and that Johnson had only bought this bull in question four days before October 25, and had kept him shut up in the barn until the morning of October 25, when he turned him into his pasture. We find no evidence in the record that plaintiff in error knew Johnson was the owner of the bull. On the contrary, we think all the evidence is consistent with the testimony of plaintiff in error that he did not think this bull belonged to Johnson, because only a few days before he had found an entirely different bull belonging to Johnson in his pasture and that that bull had been taken away by Johnson. On this state of the record the instructions on the question of malice should have been accurate.

Instruction 13 given for the People stated, among other things, that unless the jury believed, "from the evidence, that an ordinarily cautious and prudent man situated as was the defendant at the time he castrated said bull, as shown by the evidence, would believe that the castration of said bull was absolutely necessary for the protection of his property, and that his property could not have been protected by keeping said bull and his cows separate and apart, or that he could not have confined said bull or otherwise have reasonably protected his property, then such castration of said bull was unlawful," etc. That part of the instruction which reads, "absolutely necessary for the protection of his property," in our judgment was very liable, on the facts in this case, to mislead the jury. Even in self-defense in homicide cases, though section 149 of our Criminal Code provides that to justify homicide in self-defense it must appear "that the killing of another was absolutely necessary," the giving of an instruction containing these words has been uniformly held to be reversible error. (*Kipley v. People*, 215 Ill. 358, and cases there cited.) The same rules of law do not apply to the protection of one's property as in case of the defense of one's own life. The natural, essential and inherent right of protecting property is the right to do whatever, under the circumstances of each case, apparently is reasonably necessary to be done in its defense. Plaintiff in error might have entertained an erroneous idea of the character of this animal. The difference in the value of a human life from that of an animal requires reasonableness to be used as to the quality and quantity of the defensive force and with some reference to the consequences. A very exhaustive and instructive discussion on this subject is found in *Aldrich v. Wright*, 53 N. H. 398. This court, in *Calef v. Thomas*, 81 Ill. 478, in discussing a section of the statute then in force, said: "Still, the plaintiff is not to be deemed guilty simply because she misjudged her legal rights and acted with too much precipitation. If

a person of ordinary prudence and caution, situated as she was and subject to the influences that operated on her mind, would have supposed the act was necessary to the enjoyment of the use of the property, and she acted under that belief, she could not be held guilty of having acted maliciously." We think by the instruction here in question the plaintiff in error was held to a much more strict rule than in the case just referred to. The giving of the instruction in question was reversible error.

Plaintiff in error complains of instructions 3 and 4 given for the People, insisting they were not accurately drawn as to the question of malice. We are disposed to agree with this contention, but the errors in these instructions are not in themselves sufficient to justify a reversal.

Plaintiff in error also argues that the court erroneously modified his instructions 6 and 12. Those instructions were not accurately drawn as presented nor as modified by the court. Our views on the question of law involved are so fully set forth in this opinion that we do not deem it necessary to comment at length on these two instructions.

Plaintiff in error further insists that the court erred in not permitting him to introduce certain evidence to the effect that if a bull of another breed of cattle covers a cow and she produces what is called a cross-bred calf, there will remain with the mother a tendency to cross-breed ever afterwards. The court permitted plaintiff in error to testify that a cross-bred calf is worth about \$5 the day it is born, while a full-blood calf of the character of cattle he was raising is worth from \$50 to \$100 at birth. We think the evidence as to the tendency to cross-breed was admissible for the same reason that the evidence showing a cross-breed was worth only \$5 was admissible. This evidence tended to show the seriousness of the injury to the cows of plaintiff in error by having this bull loose among them, and would have a bearing on the motive that actuated him in doing what he did.

Plaintiff in error also insists that the court erred in not permitting him to introduce evidence to the effect that a bull which had once attacked a man will have a habit, for a long time thereafter, of attacking that particular man, and that the only known remedy is to castrate the bull. We are disposed to hold that this evidence was admissible for the purpose of showing want of malice on the part of plaintiff in error. In *Wright v. State*, 30 Ga. 25, it was held that proof that a mule shot by the defendant was of a thievish and ungovernable character should have been admitted in order to show that defendant's motive in shooting the mule was to protect his crop, and not through ill-will to the owner or cruelty to the animal. In *Woods v. State*, 27 Tex. App. 586, the defendant was prosecuted for castrating a stallion to prevent him from bothering defendant's brood mares. Defendant asked an instruction to the effect that if it reasonably appeared to defendant that his stock was in danger of injury from the stallion, and he inflicted the wound to prevent the injury, then he was not guilty. It was held error to refuse this instruction. In *Thomas v. State*, 14 Tex. App. 200, the defendant was convicted of willfully and wantonly killing four sheep. The defendant set up his right to protect his property. The court, in deciding the question, said that while it clearly appeared from the evidence that the defendant killed the sheep, it was also clear that he killed them in defense of his own sheep; that he had a flock of 1600 ewes upon the range in the month of July and that the bucks that were killed got with the ewes and were getting them with lambs. The testimony showed that lambs begotten at that season of the year would be born in the winter, and most of the lambs, as well as most of the mothers, would die. The court held that to make the killing of the sheep a willful act it must have been with malice and without legal justification; that to make it a wanton act it must have been committed regardless of the rights of the owner of the

sheep, in reckless sport or under such circumstances as evinced a wicked or mischievous intent and without excuse; that if the defendant killed the sheep in the necessary protection of his property, after using ordinary care to prevent injury which was being inflicted upon it, it would not be a willful or wanton act, within the meaning of the statute. *Burlington v. Turner*, 3 Lev. 28, was an action of trespass for killing two dogs. The defendant pleaded that the dogs killed a deer in his park, and in order to prevent more mischief by them he killed them. This was held a good plea. Even if a person does an act willfully or wantonly, for the purpose of injuring an animal, it does not necessarily follow that he did it with malice toward the owner. The words "wanton," "willful" and "unlawful," under the authorities, do not necessarily mean, in statutes on malicious mischief, the same as "malicious." (19 Am. & Eng. Ency. of Law,—2d ed.—643, 644, and authorities cited; 25 Cyc. 1677, and cases cited; Words and Phrases, 4307. See, also, *Glover v. People*, 204 Ill. 170.) The question of malice and the intent of the plaintiff in error in committing the act in question was, as we have seen, the crucial point in this case. Any evidence that fairly bore on this point should have been admitted for the consideration of the jury.

Counsel for plaintiff in error further argue, that, even though the evidence justified submitting this case to the jury, the verdict must be held excessive and should not be allowed to stand; that the proof shows that the bull was worth only \$40; that it was castrated without cruelty or unnecessary pain and in such a way that it became an ordinarily healthy and valuable steer. We are inclined to agree with the contention of plaintiff in error that the verdict is excessive. While this is not a suit to reimburse the owner, we can hardly understand how a jury, unless moved by passion or prejudice or by a misunderstanding of the law, could, on the facts in this case, have fixed so severe

a punishment. It is evident from the remarks of the trial judge found in the record that he felt the same way as to the verdict but hesitated to set it aside. Under our bill of rights "all penalties shall be proportioned to the nature of the offense." We think this verdict was excessive.

Complaint is also made of some remarks of the judge presiding at the trial. We think this complaint is without merit. The court's remarks, in our judgment, were not improper or calculated to mislead the jury.

For the errors indicated, the judgments of the Appellate and the circuit courts will be reversed and the cause remanded to the circuit court.

Reversed and remanded.

A. MONTGOMERY WARD, Appellant, *vs.* FIELD MUSEUM OF NATURAL HISTORY *et al.* Appellees.—SOUTH PARK COMMISSIONERS, Appellant, *vs.* A. MONTGOMERY WARD *et al.* Appellees.

Opinion filed October 26, 1909.

1. PARKS—*dedication of park for particular purpose cannot be changed by city or legislature.* Where a park has been dedicated by the owners of the land for a particular purpose, neither the city which has charge of the park nor the legislature can change the legal result of the act of dedication or divert the park from the original purpose.

2. MUNICIPAL CORPORATIONS—*cities and park boards are creatures of the legislature.* Cities and park boards are creatures of the legislature for the purpose of administering certain functions of local government within specified territory, and the legislature has full power to transfer the control of property held by them for public use from one to the other, or to any other agency created for the purpose of exercising governmental powers.

3. SAME—*power of the legislature over municipal corporations.* Subject to the limitation of the constitution relating to local or special legislation, municipal corporations, which are purely of legislative creation for the purpose of local government, may be

changed, modified, enlarged, restrained or abolished by the legislature to suit the exigencies of the case, and the powers and duties with which they are invested may be imposed upon others.

4. RES JUDICATA—*judgments of Supreme Court against agency of State are res judicata as to successive agencies.* The judgments of the Supreme Court against the city of Chicago in *City of Chicago v. Ward*, 169 Ill. 392, and against the State of Illinois, represented by the board of commissioners of lake front armory, in *Bliss v. Ward*, 198 Ill. 104, are binding upon all citizens of the city and upon the State and all its subordinate agencies having successive relationship, under legislative control, to the same rights of property, including the South Park board and those claiming under it by contract. (*C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454, explained.)

5. DEDICATION—*when reclaimed land is subject to the terms of original dedication.* The land reclaimed by the city of Chicago by filling Lake Michigan east of the Illinois Central Railroad Company's right of way in Chicago between Randolph street and Park Row is subject to the same restriction against building as was imposed by the original dedication of the land west of such right of way in both the Fort Dearborn and the canal commissioners' subdivisions, and such restriction prohibits buildings of any kind.

APPEALS from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding.

GEORGE P. MERRICK, (ELBRIDGE HANEY, of counsel,) for A. Montgomery Ward.

HOLLETT, SAUTER & HENKEL, (R. P. HOLLETT, and L. E. SAUTER, of counsel,) for the South Park Commissioners.

EDWIN WALKER, and WINSTON, PAYNE, STRAWN & SHAW, (JOHN BARTON PAYNE, JOHN S. MILLER, and WALTER H. JACOBS, of counsel,) for the Field Museum.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This suit is a renewal of a controversy of long standing between A. Montgomery Ward and the public authorities having the control and management of what is now known

as Grant Park, in the city of Chicago, concerning the right of Ward to have the park kept free from public buildings, which was adjudicated between him and the city in the case of *City of Chicago v. Ward*, 169 Ill. 392, and again between him and commissioners of the State in *Bliss v. Ward*, 198 Ill. 104. The history of Grant Park and the material facts governing the rights of the parties were recited at length in the opinions of the court in those cases, but for the purpose of a clear understanding of the questions involved and decided it is considered proper to bring all the facts together in this opinion.

The Congress of the United States, by an act approved March 2, 1827, granted to the State of Illinois certain lands for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan. The State was authorized to sell and convey the whole or any part of the land and give title in fee simple therefor. By an act of the legislature of January 22, 1829, provision was made for the appointment of commissioners to sell the lands, and by act of February 15, 1831, the commissioners were constituted a board, to be known as "Board of Canal Commissioners of the Illinois and Michigan Canal." A selection of lands was made by the commissioners, and on May 21, 1830, was approved by the President, and among the lands so selected was fractional section 15, in which that part of Grant Park south of the center of Madison street extended east is located. By an act approved January 9, 1836, the board of canal commissioners were directed to proceed to sell certain lots, including said section, which was first to be laid off into town lots, streets and alleys, as in the judgment of the commissioners would best promote the interest of the canal fund. The commissioners made a subdivision containing two tiers of eleven blocks each, bounded on the west by State street, on the north by the center line of Madison street, on the south by the center line of Twelfth street and on the east by Lake Michigan, with streets and

alleys, and the plat was acknowledged and recorded July 20, 1836. The open space between the east line of the eastern tier of blocks and the lake, as far south as block 23, now known at Park Row, was left unsubdivided and vacant. At the north line of the section this space was about five hundred feet wide and at Park Row it was about seven hundred feet wide, and that space was marked with the words "Michigan avenue," which, so far as the plat went, indicated the use of the whole space as an avenue. The commissioners prepared plats or sketches for the purposes of sales and distributed them to the public and prospective bidders, and on these plats or sketches the open space was marked "Open ground—no building," or equivalent words indicating that it was to be kept open and clear of any buildings. The lots were sold with reference to such plat or sketch, and they sold at a higher price on account of the eastern exposure to the lake and restriction as to buildings.

When the canal commissioners' subdivision was laid out, the south-west fractional quarter of section 10 lying north of it was owned by the United States and occupied for a military post as Fort Dearborn reservation, and had been so occupied as early as 1804. In the year 1839 it was subdivided, under authority of the Secretary of War, into blocks, lots, streets and public grounds, as Fort Dearborn addition. On the plat an open space was reserved for public grounds east of Michigan avenue between Randolph and Madison streets, fronting on Lake Michigan, and marked on the plat, "Public ground forever to remain vacant of buildings." The acknowledgment of the plat contained the following: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." Ward owns lots and buildings fronting on Michigan avenue between Washington and Madison streets. In 1844 the city council accepted the public ground by a resolution that all that part of Michigan avenue lying east of a line ninety feet

east of the east tier of blocks of section 15 should be enclosed as a public ground, and all that part of said avenue in the Fort Dearborn addition lying east of a line drawn south from the south-west corner of land belonging to the estate of John Wright and occupied by Mr. Lamb should be enclosed as a public park, at the expense of the subscribers to such enclosure. The land belonging to the estate of Wright was at the north-east corner of Michigan avenue and Randolph street. This resolution limited the use of the space for street purposes to ninety feet and accepted the remainder as a public park, and that division has always been acquiesced in. The width of the park was reduced, after the dedications, by encroachments of the lake.

In 1852 the Illinois Central Railroad Company, under authority from the State and an ordinance of the city, located its railroad in Lake Michigan over submerged lands in front of the then existing park, and laid its tracks on piles driven in the bed of the lake and built a breakwater to protect the same. The legislature, by an act of February 18, 1861, amending the act incorporating the city of Chicago, prohibited the railroad company from encroaching upon the land or water west of a line not less than four hundred feet east of the west line of Michigan avenue and prohibited the city from allowing any encroachment west of that line. It provided that any person being the owner or interested in any lot fronting on Michigan avenue should have the right to enjoin said company, and all other persons and corporations, from any violation of the provisions of the act. It contained this confirmation of the representations of the canal commissioners: "The State of Illinois, by its canal commissioners, having declared that the public ground east of said lots should forever remain open and vacant, neither the common council of the city of Chicago nor any other authority shall ever have the power to permit encroachments thereon without the assent of all persons owning lots or land on said street or avenue." The railroad company

filled up its right of way, which by the ordinance was three hundred feet wide, and the bed of the lake was gradually filled from the shore by the deposit of waste and rubbish. At the time of the great fire of 1871 there was still a basin there, used for row boats and sail boats. The dumping of debris finally filled the space west of the railroad right of way, and disputes arose as to the titles of the railroad company, the city and the State in the made lands and submerged lands to the east. Those disputes were all finally and conclusively settled by a suit commenced March 1, 1883, in the name of the People of this State against the railroad company and the city, in which the city filed a cross-bill and which was finally decided by the Supreme Court of the United States in 1892. The court stated that the object of the suit was to obtain a judicial determination of the title of the lands on the east or lake front, between the Chicago river and Sixteenth street, which had been reclaimed from the waters of the lake and were occupied by the tracks and structures of the railroad company, and the title claimed by said company to the submerged lands constituting the bed of the lake lying east of its tracks, within the corporate limits, for the distance of one mile. The city by its cross-bill claimed the ownership in fee of the public grounds on the east front of the city bordering on the lake, contained in the two subdivisions above mentioned, and asked a decree declaring that it was such owner in fee and of the riparian rights thereunto appertaining, and the right to develop the harbor of Chicago by the construction of docks, wharfs and levees. The Supreme Court decided that the city, as riparian owner between the north line of Randolph street and the north line of block 23 extended to Lake Michigan, which is now Grant Park, had power to construct and keep in repair on the lake front, east of the premises, landing places, wharfs, docks and levees, subject, however, to the authority of the State and the supervision and control of the United States. The court confirmed the title in

the city to the lands which had been filled beyond the original shore line and reclaimed from the waters of the lake and also to the lands filled and occupied by the railroad company, subject only to the use thereof for right of way and railroad purposes. It was decided that the railroad company had a perpetual right of way over the ground for the tracks of its railway and the continuance of the break-water as a protection to its property and the shore from the violence of the lake. This carried the title of the city eastward as far as the lake had been filled. The court adjudged that the State was the owner in fee of the submerged lands constituting the bed of the lake east of the railroad tracks, but with a title different in character from that which it held in lands intended for sale; that the title so held was in trust for the people of the State, that they might enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein free from the obstruction or interference of private parties, and that the interest of the people in navigation and commerce might be improved by the erection of wharfs, docks and piers, for which purpose the State might grant parcels of the submerged lands. The State did not afterward grant or appropriate the submerged lands in the present limits of the park for wharfs, docks, piers or other uses promoting navigation or attempt to apply them to any such use, but permitted the city, as riparian owner, to continue to add to the park by filling and recognized the reclaimed lands as a part of the park. The character of such reclaimed lands as a public park is not questioned.

During the pendency of that suit in the Federal courts the city of Chicago authorized and permitted the erection of buildings and obstructions on the public grounds in front of Ward's property, and in 1890 he filed a bill in the superior court of Cook county to enjoin the city from violating the terms of the dedication in the Fort Dearborn addition. In 1896 his bill was amended by setting out the

history of the platting of the two additions and the dedications therein contained, the acceptance by the city by the resolution of April 29, 1844, and the designation of the ground by the city as Lake Park by an ordinance of August 10, 1847, and seeking a permanent injunction against the construction of buildings thereon and diverting the park from the purposes for which it was dedicated. A final decree was entered in that case restraining the city from erecting or causing to be erected any building or structure upon the premises described in the bill, to-wit, "that tract of land lying between Randolph street on the north and Park Row on the south and between the west line of Michigan avenue and the west line of the right of way and grounds of the Illinois Central Railroad Company," excepting the Art Institute, a temporary post-office until a permanent one should be completed, and armory buildings, for a period of three months. The city sued out a writ of error from this court to review that decree, and this court affirmed it in *City of Chicago v. Ward, supra*, holding that the dedications of the land were in trust for the public, not to be occupied with buildings, and that abutting owners had a right to have the park maintained in accordance with the terms of the original dedication.

On July 27, 1896, an ordinance of the city was passed giving consent to the South Park Commissioners to take, regulate, control and govern the park, except that portion lying north of the north line of Jackson street extended east to the railroad right of way, including land which might be thereafter reclaimed adjoining said park, reserving to the Field Columbian Museum the right to construct its buildings on a parcel of land 1300 feet in length by 900 feet in width, the west line to be 225 feet east of the railroad right of way, and also all that portion east of the right of way and north of the north line of Monroe street extended east to the outer sea wall, which was dedicated as a site for an armory and parade ground by the local military companies

of the Illinois National Guard. The park commissioners accepted the park as turned over to them, by a resolution adopted October 14, 1896. The legislature passed an act approved June 11, 1897, reciting the passage of the ordinance and enacting that a board of commissioners should be appointed for the purpose of planning and constructing a parade ground and armory on that part of the park reserved by the city for that purpose. The buildings were to remain the property of the State, and the city was required to enter into a contract that the right of the State to the use and occupation of the land should be perpetual and the title should be and remain in the State. The city entered into the required agreement, and the legislature passed an act approved April 22, 1899, making a further appropriation for the expenses of forming the parade ground and building the armory. The commissioners proceeded under the act, and Ward filed his bill in the circuit court of Cook county to enjoin them from constructing or erecting any building or other structure on that part of the park lying east of the railroad right of way bounded on the north by the south line of Randolph street extended east, on the south by the north line of Monroe street extended east, which included land in the canal commissioners' subdivision, and on the east by the harbor line. That suit involved both subdivisions and related to land east of the railroad right of way. The relief prayed for was granted, and this court affirmed the decree in *Bliss v. Ward, supra*. It was held that inasmuch as the city had been permitted, as riparian owner of the lands extending to the east line of the railroad right of way, to enlarge the park by filling in the shoal waters, the extension grew upon the original park as a part of it, the same as if by the process of natural accretions. The legislature expressly approved the filling and reclamation of the lands, and by an act approved April 24, 1899, recited that the title to the land, a part of which was yet submerged but the reclamation of which was contemplated

and being then undertaken by the filling of the shore line, was still, as the legislature believed, in the State, and enacted that the park should be called Grant Park. That act was amended in 1901, designating the land and submerged land north of Monroe street extended east as Grant Park and conveying to the park commissioners that part south of the north line of Jackson street. By an act approved May 14, 1903, the whole of Grant Park, bounded on the north by the south line of Randolph street extended east to the harbor line and south by the south line of Park Row extended east to said harbor line, was conveyed to the South Park Commissioners, to be held, managed and controlled by said commissioners as other parks then under their control. The legislature passed another act in force July 1, 1903, giving the corporate authorities of park districts power to erect and maintain museums within any park, and to permit the directors or trustees of any museum to erect the same in any park and to charge an admission fee, except on certain days named.

On July 20, 1903, an ordinance of the city was passed giving permission to the park commissioners to take the control of all that portion of the park lying west of the Illinois Central right of way and north of the north line of Jackson street extended east, subject to the rights of the Art Institute, the right of the John Crerar library under an ordinance authorizing the erection and maintenance of said library in the park, a reservation of so much of the park as the city council might deem necessary to construct and maintain a city hall, and the reservation of a right to place and maintain on the park a boulder twenty-five feet square as a monument to Dr. Samuel Guthrie, inventor of chloroform. In the year 1906 an attempt was made to build the Crerar library in the park but was prevented by contempt proceedings. Marshall Field died in 1906 and by his will left \$8,000,000 to the Field Museum, and the building was to be erected upon a site to be furnished. Those who were

interested in the museum and seeking a free site selected a location in the park, and the board of commissioners entered into a contract with the museum by which the building was to be erected, 1300 feet in length north and south and 800 feet in width east and west, east of the Illinois Central right of way, with the center opposite Congress street extended east. The third bill for the protection of his rights to have the park kept free from building was filed by Ward in this case in the superior court of Cook county against the Field Museum of Natural History, a corporation about to construct the museum, and the South Park Commissioners, a municipal corporation having charge and control of the park, praying for an injunction restraining the construction and erection of said building or any building impairing or obstructing his easement under the dedications by the State of Illinois and the government of the United States. The bill set out the previous suits and proceedings in connection with the facts. The museum and park commissioners answered separately, disputing the right claimed, and the park commissioners filed a cross-bill praying that Ward be enjoined from asserting any easement over Grant Park or interfering in any way with the erection by said commissioners or the Field Museum of said building or other buildings alleged to be proper in a public park. To the cross-bill Ward filed a plea in bar, setting up the previous decrees against the predecessors in right and title of the South Park Commissioners. Nothing appears to have been done with the plea. Ward also answered the cross-bill, again setting up his rights, and replications having been filed, the cause was heard by a chancellor of the superior court. The chancellor by his decree found that the erection of the museum was a proper use of a park, and divided the park into two parts, decreeing that as to the portion lying east of the railroad right of way the park commissioners had a right to erect and maintain all proper park buildings and to permit the erection and maintenance therein of the museum, but

that the commissioners had no right to erect or maintain any building west of said right of way. Ward was restrained from interfering with the erection of park buildings and the museum east of the right of way. The park commissioners and Ward severally prayed appeals from the decree, and the court certified that the validity of certain municipal ordinances was involved and the public interest required the case to be taken directly to this court.

There is no basis for a division of the park into two sections, one west of the railroad right of way and the other east of it, and that question was settled in *Bliss v. Ward, supra*. The commissioners of the State in that case contended that the decision in *City of Chicago v. Ward, supra*, fixed and determined the limits of the ground to which the building restriction extended and confined the same to the lands west of the railroad track, but their claim was held to be unfounded. The first case related to that part of the park west of the right of way, the title of which was in the city in trust for the public for the uses of a park, and the title to the submerged lands east of the right of way was in the State of Illinois in trust for purposes of navigation and fishing. In the second case it was held that the extension of the park over the submerged lands, whether by natural accretions or artificial means, carried with it the same restrictions against buildings. None of the parties in this case rely upon any distinction or division of that kind, but the substance of the argument is, that there is no restriction against such buildings as are proper to be placed in a public park, and that the question whether there is any restriction against such buildings has never been decided.

Questions concerning the proper uses of public parks and what buildings may be erected in parks or have been erected in other parks are not involved in this case. The claim of Ward is, and has been, that by virtue of the original dedication of Fort Dearborn addition the public ground east of Michigan avenue is forever to remain vacant of

buildings, and that the sales by the canal commissioners of lots in their subdivision, upon a representation that the open space east of the west line of Michigan avenue should be open ground with no building, prevents the construction of any building for any purpose. The nature or use of a building is not material, and counsel are in error in their view that the question whether buildings may be erected in this park has not been decided. Although the doctrine of *res judicata* embraces not only what has been actually determined in the former suit but also extends to any other matter which might have been raised and determined in it, (*Harvey v. Aurora and Geneva Railway Co.* 186 Ill. 283,) the identical question in this case was decided in the former suits. Where a park has been dedicated for a particular purpose, the municipality having it in charge cannot divert it from that purpose. (*Village of Riverside v. Mc-Lain*, 210 Ill. 308.) And in *City of Chicago v. Ward, supra*, the court held that it was beyond the power of the legislature to change the legal result of the acts of dedication. The city and the South Park Commissioners are creatures of the legislature for the purposes of administering certain functions of local government within specified territory. (*People v. Walsh*, 96 Ill. 232; *West Chicago Park Comrs. v. City of Chicago*, 152 id. 392.) "The city of Chicago, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Illinois, governs for Illinois, and its authorized legislation and local administration of law are legislation and local administration by Illinois through the agency of that municipality." (*Byrne v. Chicago General Railway Co.* 169 Ill. 75, on p. 85.) The city held, and the park commissioners now hold, the park in the exercise of governmental powers in trust for the public. Such corporations, being purely of legislative creation for local government, the legislature may control and dispose of their property as shall appear to be best for the public. The legislature may create, an-

nul and change municipal corporations and control and dispose of their property, subject only to the constitutional provision relating to local or special legislation. Subject to that condition they may be changed, modified, enlarged, restrained or abolished to suit the exigencies of the case, and the powers and duties with which they are invested may be imposed upon others. (*Wilson v. Board of Trustees*, 133 Ill. 443; *Town of Cicero v. City of Chicago*, 182 id. 301; *City of Chicago v. Town of Cicero*, 210 id. 290; *People v. Walsh*, *supra*.) The only right which the South Park Commissioners have is derived from the city and acts of the legislature and the only right of the Field Museum is under the contract with the park commissioners. The judgments of this court against the city and the State are therefore binding and conclusive upon both the park commissioners and the Field Museum. The judgment against the city concerning the land west of the right of way was binding upon all the citizens of the municipality and upon the State. (*Harmon v. Auditor of Public Accounts*, 123 Ill. 122; *Griffith v. Vicksburg Water-works Co.* 8 Am. & Eng. Ann. Cas. 1130; 24 Am. & Eng. Ency. of Law,—2d ed.—755.) The judgment against the commissioners of the State that the restriction extended to the reclaimed land beyond the right of way was conclusive not only against the State but all its subordinate agencies having successive relationship, under legislative control, to the same rights of property; (23 Cyc. 1215;) and in that case the commissioners not only claimed in the right of the State, but under an ordinance of the city. To permit each successive agency to which the legislature may transfer the management and control of the park to litigate the question once finally and conclusively determined against the State and the agency in control of the park at the time of the adjudication would be intolerable and contrary to established rules of law.

Counsel cite and quote from *Chicago, Burlington and Quincy Railroad Co. v. Lee*, 87 Ill. 454, to sustain the argument that the former judgments are not *res judicata* of their present claim that all buildings proper for a park may be erected in this park. That, like other cases announcing the same doctrine, was an action at law where there was a trial by jury and the judgment was reversed and the cause remanded with an order for a *venire de novo*. There was no final judgment in this court, and, as a matter of course, the second appeal was to be decided on the evidence produced at the second trial.

There was testimony that certain structures are absolutely necessary for the comfort of the public and the proper use of the park, but most of them, such as shelters in case of storms, band stands, lavatories, toilets and the like, can be provided without the erection of what would properly be characterized as a building. There is no necessity for locating power houses, stables or things of that kind above the surface of the ground; but whatever the result may be, neither the legislature nor any municipal corporation under the authority of the legislature can violate the restriction imposed in the dedication of the property. The question in the former cases was not whether park buildings, museums or any particular kind of building could be erected on the premises, but whether a building of any kind could be so erected, and the argument which is renewed in this case, that Ward's rights extend only to the Fort Dearborn addition, was directly answered in the first case.

The decree of the superior court is reversed and the cause is remanded to that court, with directions to enter a decree dismissing the cross-bill for want of equity and granting the prayer of the original bill.

Reversed and remanded, with directions.

GRACE SMITH ROBERTSON *et al.* Appellants, *vs.* H. H.
GUENTHER *et al.* Appellees.

Opinion filed October 26, 1909.

REAL PROPERTY—*when remainder created by deed is contingent.* The remainder created by a deed to a named person "during her natural life and at her death to her children surviving her, share and share alike," is contingent, since the condition of survival may prevent the remainder from ever coming into possession and the conditional element is incorporated into the description of the remainder-men. (*Lehndorf v. Cope*, 122 Ill. 317, and *Welliver v. Jones*, 166 id. 80, distinguished.)

APPEAL from the Circuit Court of Bureau county; the
Hon. EDGAR ELDREDGE, Judge, presiding.

H. M. & CAIRO A. TRIMBLE, for appellants.

HARRIS & HERLOCKER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

The question to be decided in this case is whether a remainder in ten acres of land is vested or contingent. Henry C. Smith being the owner in fee of one hundred and four acres of land in Bureau county, conveyed the same, on April 24, 1893, by warranty deed in statutory form, "to Alice Robertson during her natural life and at her death to her children surviving her, share and share alike," charged with the payment by the "grantees" of an annuity of \$200, payable on the first day of March of each year to the said Henry C. Smith during his natural life. The grantee, Alice M. Robertson, then had four children, all of whom appear from the record to be still living. On November 14, 1905, Alice M. Robertson and her husband executed a lease of ten acres of said land to one of the appellees for a term of twenty-five years from January 1, 1906, for the purpose of opening and operating a gravel pit and digging, exca-

vating and removing gravel and sand from the demised premises. On September 15, 1906, the lessee assigned an undivided one-half interest in the lease to another of the appellees, and on October 20, 1906, the three assigned the lease to the appellee the Galesburg Gravel and Construction Company. On December 3, 1906, Alice M. Robertson, with her husband, executed an agreement to convey the same ten acres to two of the appellees, to be re-conveyed when all the gravel, sand and other material should be removed. The appellants are two of the children of Alice M. Robertson, and they filed their bill in this case in the circuit court of Bureau county to enjoin the appellees, as lessees of the life tenant, Alice M. Robertson, from committing waste by digging, excavating and removing from the land the gravel and sand thereon, and they prayed that on a final hearing the appellees might be required to cancel and surrender said lease and agreement for a deed. A temporary injunction was granted, and on a hearing it was dissolved and the bill dismissed. Appellants prayed and were allowed an appeal to the Appellate Court for the Second District, and that court transferred the cause to this court for the reason that a freehold is involved.

The material facts were not in controversy, and counsel are agreed that the decision of the question whether the remainder after the life estate of Alice M. Robertson is vested or contingent will dispose of the case. The conveyance of Henry C. Smith was to Alice M. Robertson for life and at her death to her children surviving her. The remainder was therefore subject to the condition precedent that the children of Alice M. Robertson, or some or one of them, should survive her to take the estate. The event which will determine the life estate must happen, but the event which will give appellants the remainder, or a share of it, is that they shall survive the life tenant, which may not happen. The person or persons who will take the remainder can only be ascertained upon the determination of

the life estate, when the remainder will take effect. The remainder is therefore not certain to take effect in possession but is subject to a condition which is precedent, both in form and substance. The condition may prevent the estate from ever coming into possession, and the conditional element is incorporated into the description of the remainder-man. Under all rules of construction the remainder is contingent. *Haward v. Peavey*, 128 Ill. 430; *Walton v. Follansbee*, 131 id. 147; *Mittel v. Karl*, 133 id. 65; *Temple v. Scott*, 143 id. 290; *Brechbeller v. Wilson*, 228 id. 502; *Kales on Future Interests*, sec. 109.

Counsel for appellants call attention to a number of decisions which they regard as supporting their argument that the remainder in this case is vested. The one which appears to be mainly relied upon is *Lehndorf v. Cope*, 122 Ill. 317. But in that case the deed of James W. Humphrey and wife conveyed the lands to "Maria Anna Lehndorf and her heirs by her present husband, Henry Lehndorf." She had two children who answered the description of the deed at the time it was executed. The remainder was not subject to any condition, and at common law Maria Anna Lehndorf would have taken an estate tail, but under section 6 of the Conveyance act she took a life estate with remainder in fee to her children by her said husband. The remainder vested in fee in the children living at the time the deed was executed, subject to be opened to let in after-born children of the same class. Another case relied on is *Welliver v. Jones*, 166 Ill. 80, where the will gave certain lands "to my wife, Morganna, and her heirs by me." The testator died leaving Morganna Welliver, his widow, and one child, and the court held, as in the other case, that under the Conveyance act Morganna Welliver took a life estate with remainder in fee simple absolute to the child, and held that the remainder was vested. None of the cases cited by counsel for appellants are similar to this one.

The decree is affirmed.

Decree affirmed.

FRANK T. SMITH, Defendant in Error, vs. PETER J.
HUNTER *et al.* Plaintiffs in Error.

Opinion filed October 26, 1909.

1. SPECIFIC PERFORMANCE—*court will not compel vendee to accept clouded title.* In specific performance the court will not compel the vendee to accept a title clouded with substantial defects, or one which he may be required to defend by litigation or which he cannot readily dispose of by reason of defects therein.

2. SAME—*proof that vendor's title is doubtful is good defense.* Where the vendor in a contract for the sale of land has agreed to furnish an abstract of title showing good merchantable title in him, all the vendee need do to defeat a bill by the vendor for specific performance is to show that the title which the vendor was prepared to convey was doubtful in character.

3. SAME—*time when sufficiency of abstract of title is to be determined.* In specific performance the sufficiency of the abstract of title is to be determined as of the date when the abstract was to be furnished and the deal closed under the terms of the agreement, and not as of some time subsequent to the filing of the bill for specific performance.

4. JURISDICTION—*service by publication—sufficiency of the notice that decree has been entered.* Under section 19 of the Chancery act, providing that a party who has not been served with summons or by copy of the bill and has not received the notice required to be sent him by mail in case of publication, shall have three years in which to petition to open the decree unless he is notified in writing of the entry of the decree, in which case he shall have one year from the receipt of such notice, the written notice of the entry of the decree must be something more than a mere letter from a co-defendant, stating, in general terms, the result of the litigation, of which the recipient of the letter has had no previous notice.

5. SAME—*when an executor does not represent heir-at-law.* An executor having merely a power to sell land at the end of the life estate and pay over the proceeds to named persons, including an heir of the testatrix, does not represent such heir to the extent that the making of the executor a party to a bill to reform the deed under which the testatrix held title to the land will render the decree binding on the heir, who was a non-resident of unknown address, who was not served by summons or by copy of the bill and who did not receive the notice of publication.

6. *WILLS—distinction between directions to executor to sell and devise to executor with power to sell.* There is a distinction between a direction to an executor to sell real estate and a devise to the executor with power to sell, as in the former case the executor has a mere naked authority to sell, the freehold remaining in the heirs until the sale, while in the latter case the authority to sell is coupled with an interest and the freehold vests in the executor immediately.

7. *SAME—when a will does not vest legal title in executor as trustee.* A will providing that the husband of the testatrix shall have the use of certain land during his life and upon his death the land shall be sold by the executor and the proceeds divided by him among named persons, does not pass the legal title to the executor as trustee but the title remains in the heirs of the testatrix until the sale.

8. *ABSTRACTS OF TITLE—when abstract of title is defective.* In specific performance the abstract of title must be held not to show good merchantable title, where it shows a decree reforming a deed less than three years before the time fixed for consummating the sale but fails to show that the court acquired jurisdiction of a necessary party to the proceeding in such manner as to bar his right to come in, under section 19 of the Chancery act, and petition to open the decree and defend the suit to reform the deed.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

THOMAS L. JARRETT, for plaintiffs in error.

PATTON & PATTON, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by Frank T. Smith in the circuit court of Sangamon county against Peter J. Hunter, Nellie Hunter and Thomas L. Jarrett to enforce the specific performance of a contract in writing bearing date January 4, 1908, whereby Frank T. Smith agreed to sell and Peter J. Hunter agreed to buy 87.37 acres of land situated in Sangamon county for the sum of \$15,000 on the second day of March, 1908. The contract provided Smith was to furnish Hunter an abstract of title to said lands

showing a good merchantable title to said land in Smith. Hunter refused to perform the contract and demanded that Smith return to him the \$1000 note signed by himself and wife, and thereupon Smith tendered to Hunter a deed to the land and filed a bill for the specific performance of the contract against Peter J. Hunter, Nellie Hunter and Thomas L. Jarrett. The latter was the attorney of Hunter, who held in his possession certain notes and mortgages executed by Hunter and wife upon said premises and other lands for a part of the purchase price of said premises. Answers were filed to the bill after a demurrer thereto had been overruled, and subsequently the bill and answers were amended. Exceptions were filed by the complainant to the answers and sustained to the material parts of the same, and the defendants having stood by their answers, a decree was entered in accordance with the prayer of the bill, and the defendants have sued out this writ of error to review said decree.

Numerous questions have been discussed in the briefs filed by the respective parties, but from the view we take of the case we deem it necessary to only discuss the question whether the abstract of title furnished Hunter by Smith showed a good merchantable title to said premises in Smith at the time the contract was to be consummated.

The title to the land stood of record in Anna E. Correll at the time of her death, on October 19, 1904. By her will she provided that her husband, L. S. Correll, should have the use of said premises during his life and upon his death it should be sold by her executor, and Hugh M. Greider (who was her nephew) or his bodily heirs should be paid \$2500 in cash out of the proceeds arising from said sale and the balance should go to other parties whom she named in her will. After the will of Anna E. Correll had been admitted to probate, her husband, L. S. Correll, filed a bill in chancery in the circuit court of Sangamon county against Hugh M. Greider and others to reform the deed by which

said land had been conveyed to Anna E. Correll so as to invest himself with the fee title to said premises, and a decree was entered in accordance with the prayer of the bill. Hugh M. Greider was a non-resident of the State and service was had upon him by publication. The residence of Hugh M. Greider being unknown he did not receive the notice required to be sent him by mail, neither was he served with a copy of the bill. He had, therefore, by virtue of section 19 of the chancery code, (Hurd's Stat. 1908, chap. 22,) one year after notice in writing given him of such decree, or three years after the entry of said decree if no such notice had been given him, to appear in said suit and petition the court to be heard touching the merits of such decree so far as it affected his rights, and as three years had not elapsed between the entry of said decree and the time fixed for the consummation of the sale from Smith to Hunter, Hunter claimed the title of Smith to the premises was likely to be defeated by the decree entered in the suit of *Correll v. Greider et al.* being set aside or modified upon the application of Hugh M. Greider, and that Smith did not have a merchantable title to said premises, and based his refusal to perform said contract upon the ground that Smith did not have a good merchantable title to said premises, as shown by the abstract of title furnished him by Smith.

It is not claimed by Smith that Greider was served with summons or by copy of the bill, or that he received the notice required to be sent him by mail in case of service by publication, in the case of *Correll v. Greider et al.*, through which decree Smith deraigned title, but it is contended that notwithstanding those facts the abstract furnished Hunter showed he had a good merchantable title to said premises on the day on which said contract was to be consummated, and the main question in controversy in this suit is, did said abstract of title show that Smith had a good merchantable title to said premises on that day?

The will of Anna E. Correll named Thomas E. Tomlin executor of her will and he qualified as such and was a party defendant in the case of *Correll v. Greider et al.*, and it is contended that he represented Hugh M. Greider in said cause in such manner that the decree entered in that cause was binding upon Greider although the court did not acquire jurisdiction of the person of Greider by service of summons, service by copy of the bill or by publication and mailing of notice, as provided by statute. By the provisions of the will of Anna E. Correll the title to the land in question did not vest in her executor but descended to her heirs, subject to be divested by sale by her executor upon the death of her husband, who had a life estate in the premises. There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In one case a naked authority is given to sell; in the other an authority to sell, coupled with an interest, is given. In the former case the freehold remains in the heirs until a sale is made by the executor; in the latter case a freehold immediately vests in the executor. (*Jackson v. Schaubert*, 7 Cow. 187.) In this case the legal title to the lands was not in the executor as trustee. We think, therefore, it clear that Hugh M. Greider, as heir-at-law of Anna E. Correll, was a necessary party in the case of *Correll v. Greider et al.*, and that his interest in the lands of his aunt, Anna E. Correll, as her heir-at-law and as her devisee, was not represented by her executor in that suit in such way as to bind Greider by the decree entered in that case.

It also appears that after the decree was entered in that case the executor wrote Hugh M. Greider, whose residence he ascertained subsequent to the entry of the decree, a letter, in which he notified him of the result of the litigation in the case of *Correll v. Greider et al.* in very general terms, and it is said that Greider was bound to take steps within one year from the date and receipt of such letter, under

the provisions of section 19 of the chancery code, to open up said decree and protect his rights in said lands or he would be bound by said decree, and as more than one year had elapsed subsequent to the entry of said decree before the execution of the contract between Smith and Hunter, the title of Smith was good as against Greider. We do not agree with this contention. The statute provides that a person who has not been served with summons or by copy of the bill, and who has not received the notice required to be sent him by mail in case of publication, shall have three years in which to petition the court in which the case is pending, to open up said decree and allow him to defend, unless he has been notified in writing of the entry of said decree, in which case he must file his petition to open up the decree within one year from the receipt of such notice. The notice required to be given a defendant served by publication who has not received the notice required to be sent him by mail, in order to bar his rights in one year, is of great importance to a defendant who has been served by publication but not received actual notice of the pendency of a suit, and we think must be something more than a letter written him by a co-defendant which informs him, in general terms, of the result of litigation to which he has been made a party, but of which he has received no actual notice until a decree has been entered against him barring him of all his rights in the subject matter of the litigation. (*Lyon v. Robbins*, 46 Ill. 276; *Southern Bank of St. Louis v. Humphreys*, 47 id. 227; *Sale v. Fike*, 54 id. 292; *Martin v. Gilmore*, 72 id. 193.) We are of the opinion the letter written Greider by Tomlin did not have the effect to limit the time in which Greider might apply to the circuit court, under section 19 of the chancery code, to have his rights in the subject matter of said litigation adjudicated and determined.

It is finally urged that it appears from the supplemental bill filed by Smith in this case that Hugh M. Greider ap-

peared in the case of *Correll v. Greider et al.* after the commencement of this suit and filed a petition to have said decree opened up and for leave to have his rights determined in that suit, and that the court denied him such leave. The time fixed for closing the sale between Smith and Hunter was March 2, 1908, but by mutual arrangement, and with a view to perfect, if possible, Smith's title, the time for closing the deal was extended to March 11, 1908. On that day the parties met and Hunter demanded of Smith that he obtain a quit-claim deed from Hugh M. Greider releasing his interest, if any, in said premises. Smith declined to obtain a deed from Greider, saying that it would lead to litigation. Hunter then declined to perform and demanded the thousand dollar note which he had given to Smith, and Smith then tendered to Hunter a deed for said premises and demanded that he perform the contract, and upon Hunter's refusal so to do he filed this bill. The general rule is, that the sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time subsequent to the filing of a bill for specific performance. (*Street v. French*, 147 Ill. 342; *Gage v. Cummings*, 209 id. 120; *Clark v. Jackson*, 222 id. 13.) The case of *Gibson v. Brown*, 214 Ill. 330, differs in its facts from the case at bar and is not in conflict with the foregoing authorities.

We are of the opinion the abstract of title furnished Hunter by Smith did not show that Smith had a good merchantable title to said premises on March 11, 1908, and that when on that day Smith tendered Hunter a deed for said premises Hunter was not bound to accept the title tendered him by Smith. The law is well settled that a court of chancery will not force upon a vendee a title clouded with substantial defects, or one that a purchaser may be required to engage in litigation to defend, or one that he cannot read-

ily dispose of by reason of defects therein. All the defendant is bound to show to defeat a bill for specific performance is that the title which his vendor is prepared to tender him is doubtful in its character. *Close v. Stuyvesant*, 132 Ill. 607; *Mead v. Altgeld*, 136 id. 298; *Street v. French*, *supra*; *Harrass v. Edwards*, 94 Wis. 459.

The decree of the circuit court will be reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

JAMES B. MILLER, Appellant, *vs.* MILTON SUTLIFF *et al.*
Appellees.

Opinion filed October 26, 1909.

1. FRAUD—*to be a fraud in law a representation must be an affirmation of a fact.* To constitute a representation a fraud in law, such as will justify setting aside an ordinary transaction of bargain and sale, the representation must be an affirmation of a fact and not a promise to do something in the future; and while a statement of a matter in the future, if affirmed as a fact, may amount to a fraudulent representation, it must amount to more than an agreement to do something in the future.

2. SAME—*intention not to perform does not amount to fraud.* A mere breach of contract in an ordinary business transaction does not constitute fraud in law, and neither the promisor's knowledge of his inability to perform nor his intention not to perform will make the transaction fraudulent, as the rule applicable to conveyances made in consideration of the support of the grantors for life does not apply to ordinary bargains and transactions for gain.

3. DEEDS—*when a deed will not be set aside as for fraudulent misrepresentations.* Failure of the grantees of a coal right to keep their agreements (which constituted the sole consideration for the deed) to move a large industry upon the grantor's land, build a railroad, employ a large force of men and to mine the coal and deliver grantor's share to him free of charge, is not such fraud as justifies setting aside the deed and canceling it as a cloud on title.

APPEAL from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

GEORGE J. JOCHEM, for appellant:

Statements of intention with no intent to perform them, if they induced action, are fraudulent and grounds for equitable relief. *Bispham's Eq. Jur.* (7th ed.) 318; *Godwin v. Horne*, 60 N. H. 486; *Stebbins v. Petty*, 209 Ill. 293; *Murray v. Tolman*, 162 id. 417; *Pickard v. McCormick*, 11 Mich. 68; *Jones v. Neely*, 72 Ill. 449; 14 Am. & Eng. Ency. of Law, (2d ed.) 49.

The failure or neglect of the defendants to carry out these promises presumes a fraudulent intent in entering into the contract. *Jones v. Neely*, 72 Ill. 449; *Frazier v. Miller*, 16 id. 59; *Stebbins v. Petty*, 209 id. 293.

Failure to perform a promise made with fraudulent intent is a sufficient ground for equitable relief. 14 Am. & Eng. Ency. of Law, (2d ed.) 49.

While the consideration named in the deed cannot be denied for the purpose of invalidating the deed, nevertheless the true consideration of the deed can be shown to show that there was either a failure of consideration, which would invalidate the deed, (*Jones v. Neely*, 72 Ill. 449; *Stannard v. Railway Co.* 220 id. 469;) or that there was fraud in obtaining it. *Wood v. Stone*, 85 Ill. 603; *Harris v. Dumont*, 235 id. 435.

FRANCIS H. TICHENOR, for appellee:

The consideration in a deed cannot be disproved for the purpose of defeating the conveyance or affecting its legal import. *Jones on Real Estate and Conveyancing*, sec. 301; *Kimball v. Walker*, 30 Ill. 482; *Morris v. Tillson*, 81 id. 607; *Sprigg v. Bank*, 14 Pet. 206; *McCalla v. Bane*, 45 Fed. Rep. 828; *Peck v. Vanderberg*, 30 Cal. 11; *Herman on Estoppel*, sec. 246; *Washburn on Real Prop.* 619, 328; *Rawle on Covenants of Title*, 258.

Where a party claims fraud has been perpetrated upon him in a certain transaction, he must, upon discovery of the facts, promptly declare his purpose to repudiate it and adhere to it. If he remains silent or takes no active steps in the assertion of his alleged rights he will be held to have waived any objections and rights in the premises, and will be conclusively bound, in connection with the transaction, to the same extent as though the fraud had not occurred. *Day v. Improvement Co.* 153 Ill. 293; *Grymes v. Saunders*, 93 U. S. 55; *Linington v. Strong*, 107 Ill. 295; *Kelsey v. Snyder*, 118 id. 544; *Strong v. Lord*, 107 id. 25; *Dowden v. Wilson*, 108 id. 257; *Brown v. Brown*, 142 id. 400; *Greenwood v. Fenn*, 136 id. 146; *Pomeroy's Eq. Jur.* secs. 897, 964, 965.

Promises relating to acts to be performed in the future, even though made with no intention of carrying them out, are not such representations as amount to fraud in law, and such promises cannot be made the foundation for the interposition of a court of equity to avoid or nullify what the parties have done. The rule is effective even though the promises in question influenced the consummation of the transaction. *Day v. Improvement Co.* 153 Ill. 293; *Gage v. Lewis*, 65 id. 604; *Railway Co. v. Titterington*, 84 Tex. 218; *Gallagher v. Brunel*, 6 Cow. 346; *Knowlton v. Keenan*, 146 Mass. 36; *Pasley v. Freeman*, 3 T. R. 51; *Haenni v. Bleisch*, 146 Ill. 262; *Kerr on Fraud and Mistake*, 88; *Bigelow on Estoppel*, 481; *Accident Co. v. Bates*, 176 Ill. 194; *Murphy v. Murphy*, 189 id. 360; *Kitson v. Farwell*, 132 id. 327; *People v. Healy*, 128 id. 9.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

James B. Miller filed his bill of complaint in the circuit court of Peoria county against Milton Sutliff, Dwight R. Chapman, Moses J. Richards and their unknown heirs, and Augustus E. Scott, praying the court to set aside a

deed made by the complainant to Sutliff, Chapman and Richards of the undivided one-half of the coal and mineral underlying the lands of the complainant, and a deed of the same made to said Augustus E. Scott, and to declare the same void and a cloud upon complainant's title. The service was by publication of notice, and Augustus E. Scott alone appeared and demurred to the bill. The court sustained the demurrer and dismissed the bill for want of equity, and this appeal was taken from that decree.

The material facts alleged in the bill and admitted by the demurrer to be true are as follows: On October 1, 1869, the complainant was the owner and in possession of nine hundred acres of land in Peoria county, under which there were deposits of coal. The lands were in a rural community, with no railroad nearer than seven miles, and no markets other than the city of Pekin, eight miles distant, and Peoria fifteen miles, from the lands. On that day the complainant, with his wife, executed a deed to Milton Sutliff, Dwight R. Chapman and Moses J. Richards, three of the defendants, conveying the undivided one-half of all the coal and other minerals under said lands. The deed recited a consideration of \$400, and that it was made in pursuance of a contract subsisting by and between the complainant and Chapman and Phillips and by them performed. There was, in fact, no consideration paid, but the complainant was induced to make the deed by representations and promises of said defendants made first at a meeting at the farm of one of his neighbors, and afterward at a meeting held at a public school house, and finally when the conveyance was made. The representations were, that said defendants were the owners of large foundries, smelters, coke ovens and iron mills near Youngstown, Ohio; that they were men of large means and resources; that the supply of coal such as was used in their industries had practically become exhausted at their present location, necessitating a removal of the industries, and that they would remove the industries

to complainant's locality if they could find and obtain in sufficient quantities a suitable kind of coal. These representations were first made to secure the privilege of boring and prospecting for coal, and after prospecting and making borings said defendants stated that they had found suitable coal in sufficient quantities, and if the complainant and his neighbors would convey to them the undivided one-half of the coal and other minerals underlying their lands they would immediately remove their plants and industries to the locality and would employ a great number of men and build a railroad giving facilities for transportation. They represented to the complainant that if he would make the conveyance they would locate one of their plants upon his premises and the remainder in the vicinity and would proceed at once toward opening up mines on his land, and that they would mine the coal at their own expense, utilizing their portion thereof, and deliver to the complainant, at the mouth of the mine, his one-half, free from all costs and expenses whatsoever. They had already surveyed and set stakes on complainant's land for a railroad to transport their machinery and supplies, and represented that before the winter they would have the construction of the railroad under way, and that they then had one of their plants in Ohio in course of transportation, and had a steamboat in the Ohio river loaded with machinery and ready to start for this locality. The complainant relied upon the representations and executed the deed in consideration of the same and the promises of the said defendants, without any other consideration, but said defendants did not perform any of their agreements and took no steps toward fulfilling any of their promises. They were never on the premises after they received the deed, but refused, and still refuse, to carry out their promises. The complainant has been in possession of the premises ever since, and neither said defendants, nor anyone claiming under them, has ever been in possession of the subject matter of the conveyance.

Dwight R. Chapman, shortly after receiving the deed, conveyed a portion of his interest to James H. Morrow, a relative, and, together with Morrow, organized the Buckeye Coal Company. Afterward one Richard C. Flower acquired the remaining interest of Chapman and the interest left by Morrow on his death, and Flower conveyed to the Illinois Coal and Coke Company by quit-claim deed. The Illinois Coal and Coke Company conveyed, as security, by trust deed to the American Loan and Trust Company. The coal rights were sold in pursuance of a decree of foreclosure of the trust deed to the Peoria Coal and Mining Company, and the assets of the Peoria Coal and Mining Company were sold under a receiver's sale to W. T. Abbott, who assigned his certificate of purchase to A. A. Gleason and a master's deed was made to Gleason. On February 24, 1903, Gleason by a quit-claim deed conveyed all of his interest to Augustus E. Scott. All of the conveyances were made and received with knowledge of the facts and the rights of the complainant and with the notice derived from his possession.

In order to constitute fraud in law a representation must be an affirmation of a fact and not a mere promise or matter of intention. While a statement of a matter in the future, if affirmed as a fact, may amount to a fraudulent misrepresentation, it must amount to an assertion of a fact and not an agreement to do something in the future. (2 Pomeroy's Eq. Jur. sec. 877; 14 Am. & Eng. Ency. of Law,—2d ed.—47; Kerr on Fraud and Mistake, 88; *Day v. Ft. Scott Investment and Improvement Co.* 153 Ill. 293.) If a promise is made to do something in the future and at the time it is not intended to perform the promise, that fact does not constitute a fraud in the law. (Bigelow on Estoppel, 481; *Gage v. Lewis*, 68 Ill. 604; *People v. Healy*, 128 id. 9; *Kitson v. Farwell*, 132 id. 327; *Commercial Mutual Accident Co. v. Bates*, 176 id. 194.) If an intention not to perform constituted fraud, every transaction

might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of a contract does not amount to a fraud, and neither a knowledge of inability to perform, nor an intention not to do so, would make the transaction fraudulent. The bill in this case states no representation as to any past or existing fact except that the kind of coal used in the plant near Youngstown, Ohio, had become exhausted, necessitating a removal of the plant to a locality where such coal could be found, and that the defendants had a steamer in the Ohio river loaded with iron and machinery for removal, and there is no averment that either of these representations was false. The other averments of the bill amount simply to charges that the defendants to whom the deed was made failed to perform their promises, which constituted the sole consideration for the deed. The averments of the bill are not sufficient to charge fraud in obtaining the deed.

There is a class of cases relied upon by appellant which are exceptional in character and where decisions rest upon reasons not applicable to ordinary business transactions like this one. The cases begin with *Frazier v. Miller*, 16 Ill. 48, and there are a number of them where conveyances have been made in consideration of promises to support and take care of the grantors in the future. In the first case the difference between such conveyances and ordinary transactions was pointed out, and it was said that Miller had surrendered all—home and property—at once, and become wholly dependent upon Frazier for subsistence and shelter as well as a house and domestic comforts and enjoyment of society; that to be treated with unkindness, harshness and blows, under those circumstances, as a fulfillment of the obligation for a house, shelter, food, raiment and social and domestic happiness, was more than human nature could bear or a court of equity tolerate; that the contract on the part of Frazier was executory, and that no assessment of

damages could be made to meet the estimate of the costs of support. The court said that, so far as providing means for support was concerned, a decree for specific performance could be enforced, but the personal deportment and kindness indispensable to happiness in the family could not be enforced. In such cases the usual circumstances of age, feebleness and decline, when the grantors give up their earthly possessions for the consideration of maintenance and kind treatment, have been considered sufficient to call upon a court of equity to treat the contract as abandoned as well as entered into with fraudulent intent. The rule adopted in those cases does not apply to ordinary bargains and business transactions for gain.

It is not to be inferred that the representations of the three defendants as to what they would do, and which constituted the sole consideration for the conveyance, gave rise to no right in the complainant or that the right would not be enforced or relief granted by a court of equity. In an action at law there could be no measurement of the damages for a failure or refusal to remove the industries; to employ a large number of men, which would create a village or city; to build a railroad, or to mine and deliver at the surface, free of cost to the complainant, his share of the coal. A court of law could not afford any efficient or adequate remedy for the breach of obligations of that kind. But the remedy that might be given is not the one sought by this bill. The court correctly decided that the facts alleged were not sufficient to establish the charge of fraud in obtaining the conveyance or to justify declaring the deed void and removing it as a cloud upon complainant's title.

The decree is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* Thomas E. Mayes, Appellant, *vs.* EMIL J. WANER, Town Clerk, *et al.* Appellees.

Opinion filed October 26, 1909.

1. CONSTITUTIONAL LAW—*City Election act is not unconstitutional.* The registration provision of the City Election act is not unconstitutional, upon the ground that it amounts to a discrimination between legal voters in elections held in territory which is partly within and partly without the limits of the city which has adopted the provisions of such act.

2. LOCAL OPTION—*petition required by statute is jurisdictional.* The petition required by the statute for an election under the Local Option act of 1907 is jurisdictional, and the proposition whether the territory shall become anti-saloon territory cannot be submitted until a petition which conforms to the statute has been filed with the proper authorities and within the time prescribed by the statute.

3. SAME—*when petition must state that signers are duly registered legal voters.* Under section 4 of the Local Option act, in a city where the provisions of the City Election law have been adopted, a petition to submit the question whether territory wholly or partly within such city shall become anti-saloon territory must state, and the affidavit must show, that all signers of the petition residing within the limits of the city are "duly registered legal voters," and it is not sufficient to state that they are legal voters.

4. SAME—*how election should be held where territory is partly in city where City Election act is in force.* Where the town in which an election under the Local Option act is to be held lies partly within and partly without the limits of a city which has adopted the provisions of the City Election act, the board of election commissioners should conduct the election in the territory within the city limits and the legal authorities of the town should conduct the election in the territory without such limits.

5. SAME—*how petition should be prepared where territory is partly within city where City Election act is in force.* Where a town lies partly within and partly without a city which has adopted the provisions of the City Election act, a petition for an election in such town under the Local Option act should be addressed to the town clerk and the board of election commissioners, should be signed in duplicate and verified to show that signers residing in the city limits are duly registered legal voters and that those residing outside are legal voters, one of which petitions should be filed with the town clerk and the other with the election commissioners sixty days before the election is to be held.

APPEAL from the Superior Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding.

EDWIN BEBB, for appellant.

OTTO F. REICH, and FRANK D. AYERS, (I. T. GREEN-ACRE, of counsel,) for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a petition for a writ of *mandamus* filed in the name of the People, upon the relation of Thomas E. Mayes, in the superior court of Cook county, on the 27th day of March, 1909, against the town clerk of the town of Calumet and the board of election commissioners of the city of Chicago, to coerce said town clerk and board of election commissioners to place upon the ballots of the then next ensuing election, to take place on April 6, 1909, in said town, the proposition, "Shall this town become anti-saloon territory?" A demurrer was interposed to the petition by respondents and sustained and the petition was dismissed, and the relator has prosecuted an appeal to this court.

The town of Calumet is a town in the county of Cook, a part of which is within the city limits and a part of which is without the city limits of the city of Chicago. At the town election held on April 7, 1908, there were cast 5187 votes, and attached to the petition asking for the submission of said proposition were 1862 signatures. Of these 1383 were residents of territory within the city limits and 479 were residents of territory without the city limits. The affidavit attached to the petition did not state that the petitioners residing within the city limits were registered legal voters but designated such petitioners as legal voters, and the contention was made in the court below, and renewed in this court, that the petition was for that reason insufficient, and that the town clerk and board of election commissioners, by reason of that defect in the petition, were not

authorized or required by the statute to submit the proposition, "Shall this town become anti-saloon territory?" to the voters of said town, and that having refused to submit such question, and the petition filed being insufficient, the court, by *mandamus*, would not require said town clerk and board of election commissioners to submit said proposition to the voters of said town.

Section 4 of an act entitled "An act to provide for the creation by popular vote of anti-saloon territory, within which the sale of intoxicating liquor and the licensing of such sale shall be prohibited and for the abolition by like means of territory so created," approved May 16, 1907, and in force July 1, 1907, (Hurd's Stat. 1908, p. 893,) in part provides: "A petition for submission of said proposition shall be in substantially the following form: (then follows form of petition.) Such petition shall consist of sheets having such form printed or written at the top thereof and shall be signed by the legal voters in their own proper persons only, and opposite the signature of each legal voter shall be written his residence address (stating the street and the house number if there be such) and the date of signing the same. No signature shall be valid or be counted in considering such petition unless these requirements are complied with and unless the date of signing is less than six months preceding the date of filing the same. At the bottom of each sheet of such petition shall be added a statement, signed by a resident of the county in which the signers thereof reside, with his residence address as aforesaid, stating that the signatures on that sheet of the said petition are genuine, and that to the best of his knowledge and belief the persons so signing were at the time of signing said petition legal voters (and in cities, villages, and incorporated towns in which voters are or may be required to be registered, that they were at the time of signing said petition duly registered legal voters) of the said town, precinct, city or village, as the case may be; that their respec-

tive residences are correctly stated therein and that each signer signed the same on the date set opposite his name. Such statement shall be sworn to before some officer residing in the county where such legal voters reside, authorized to administer oaths therein. Such petition, so verified, or a copy thereof, duly certified as hereinafter provided, shall be *prima facie* evidence that the signatures, statement of residence and dates upon such petition are genuine and true and that the persons signing the same are legal voters of the political subdivision named."

It would seem too clear for argument that by virtue of the terms of the foregoing provision of the statute, in all cities wherein the City Election law has been adopted, (which is the case in the city of Chicago,) which law provides that only such legal voters as are registered shall have the right to vote, a petition to submit the question whether such territory shall become anti-saloon territory should only be signed by registered legal voters, and that such fact should be made to appear, in the manner pointed out by the statute, by affidavit, and that the legally constituted authorities, in this case the town clerk and the board of election commissioners, were not authorized or required to submit said proposition upon a petition which did not comply with the statute in that particular,—and this seems to be conceded by the appellant. It is, however, said by counsel for appellant that the City Election law, which provides that only registered legal voters shall have the right to vote in territory where the City Election law is in force, is unconstitutional when applied to an election where a part of the territory in which the election is held lies within and a part without a city in which the City Election law is in force, as is the case in the territory in which the election in the town of Calumet was asked to be held.

By section 20 of article 2 of the City Election law (Hurd's Stat. 1908, p. 950,) it is provided that "said board of commissioners shall make all necessary rules and regu-

lations, not inconsistent with this act, with reference to the registration of voters and the conduct of election; and they shall have charge of, and make provision for, all elections general, special, local, municipal, State and county, and of all others of every description, to be held in such city or any part thereof, at any time or in such village or incorporated town as the case may be." And by the provisions of "An act to regulate the holding of elections and declaring the result thereof for town, school township and school district purposes, where such town, school township or school district lies wholly within or partly within and partly without any city, village or incorporated town which has adopted, or may adopt an act entitled 'An act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this State,' approved June 19, 1885, in force July 1, 1885," approved March 23, 1887, in force March 23, 1887, (Hurd's Stat. 1908, p. 995,) it is provided that elections in towns, etc., in which a part of the territory lies within a city where the City Election law is in force and a part without such territory, the board of election commissioners shall have charge of the election within the territory where the City Election law is in force, and that the legal authorities of such town, etc., shall have charge of the election in the territory which lies outside of the territory where such City Election law is in force. The first statute referred to was passed in 1885 and the subsequent statute was passed in 1887, since which time both statutes have been held constitutional and enforced. (*People v. Hoffman*, 116 Ill. 587; *Wetherell v. Devine*, id. 631; *Snowball v. People*, 147 id. 260.) We think this court is therefore committed to the view that the City Election law is constitutional. If we were at this late date to hold that the registration provision of the City Election law was unconstitutional in discriminating between voters of different parts of the same political subdivision, as contended by the appellant, in this:

that while those who vote under it must be registered those who vote in territory where that law is not in force may swear in their votes, then we would be forced to hold that the City Election law only applied to city elections, and was unconstitutional as to all elections where the election was not confined to the territorial limits where said law was in force,—that is, it would be unconstitutional as to all State, county and other elections where the territory in which the election was held was not co-extensive with the limits of the city where the election was held. Our conclusion is that the City Election law is constitutional in its registration feature.

Other constitutional objections are raised to the City Election law which we think are hypercritical and need not be here considered.

We think, therefore, that the petition for the submission of the question whether or not the territory comprised within the limits of the town of Calumet should become anti-saloon territory was insufficient to require the submission of that question by the town clerk and the board of election commissioners, and that the court did not err in declining to require, by *mandamus*, those officers to print the proposition upon the ballots, as prayed.

It is also urged that the petition to submit the question whether or not said territory should become anti-saloon territory was informal, in this: that it was addressed to the town clerk and not to the town clerk and board of election commissioners; and that the petition was insufficient in that the original was filed with the town clerk and a certified copy, only, was filed with the board of election commissioners, and that the copy filed with the board of election commissioners was not filed sixty days prior to the day upon which the election was to be held at which it was asked that the question be submitted. We think it clear that the inhabitants of the town of Calumet have the right to vote upon the question whether or not the territory com-

prised within the limits of the town of Calumet should become anti-saloon territory. The petition required by the statute is, however, jurisdictional, and the proposition can not lawfully be submitted until a petition which conforms to the statute has been filed with the proper authorities and within the time prescribed by the statute. Section 2 of the Anti-Saloon Territory act provides that the petition shall be filed in the office of the clerk at least sixty days before the election at which the proposition sought to be submitted is to be voted upon, and section 5 provides that the proposition shall be submitted at the "next election," and section 1 provides that "clerk" shall mean the board of election commissioners of any city, village or incorporated town in which there shall be a board of election commissioners. As we have seen, in an election in territory which is partly situated in territory where the City Election law is in force and in territory where the City Election law is not in force, the board of election commissioners will properly conduct the election in the territory where the City Election law is in force and the legal authorities of the town will conduct the election in the territory where the City Election law is not in force. We think the proper practice is to address the petition to the town clerk and the board of election commissioners and to have the petition signed in duplicate, and have the same verified so as to show that the signers residing in territory wherein the City Election law is in force are registered legal voters and that those residing in territory where that law is not in force are legal voters, and file one of said petitions with the town clerk and the other with the board of election commissioners sixty days before the day upon which the election is to be held at which said proposition is to be submitted. Any other mode of procedure would necessarily lead to confusion, as if the petition were filed only with the town clerk there would be nothing before the board of election commissioners upon which that board could lawfully act, and if the petition were filed with

the board of election commissioners and not with the town clerk the converse would be true. The petition was therefore not in proper form, was not filed with the proper officials and was not filed in time. We therefore conclude that the trial court properly sustained the demurrer to said petition and dismissed the same.

The judgment of the superior court will therefore be affirmed.

Judgment affirmed.

JEWELL H. BAILS *et al.* Appellants, *vs.* HENRY DAVIS *et al.*
Appellees.

Opinion filed October 26, 1909.

1. REAL PROPERTY—*rule in Shelly's case is a rule of property in Illinois.* The rule in *Shelly's case* is one of the most firmly established rules of property and is unshaken in this State.

2. SAME—*the rule in Shelly's case defined.* Under the rule in *Shelly's case*, which is in force in Illinois, if an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the latter takes the remainder and the life estate.

3. SAME—*application of the rule in Shelly's case does not turn upon quantity of estate given to ancestor.* The application of the rule in *Shelly's case* to a given case does not depend upon the quantity of the estate given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise.

4. SAME—*all heirs taking as heirs must take by descent.* When an heir takes in the character of heir he must take in the quality of heir and all heirs taking as heirs must take by descent.

5. SAME—*effect of limitation to heirs by that name as a class.* A limitation to heirs by that name as a class, to take in succession, from generation to generation, requires the inheritance imported by that limitation to vest in the first taker.

6. SAME—*requisites of rule in Shelly's case.* The requisites of the rule in *Shelly's case* are a freehold estate; a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate by the designation of heirs as a class, without explanation, as meaning sons, children, etc.; the estates of free-

hold and in remainder must be created by the same instrument and be of the same quality,—both legal or both equitable.

7. *SAME—estate of ancestor and that of heirs need not be of same quantity.* It is not essential to the application of the rule in *Shelly's case* that the estate of the ancestor and the estate of the heirs be of the same quantity, and it is no objection that the life estate is in one-half the property, only, while the remainder is in the whole tract.

8. *SAME—effect of merger of life estate and remainder in ancestor.* The fact that the life estate of the ancestor in one-half the property may, by the death of the other co-tenant during the ancestor's lifetime, become merged with the remainder in him, does not affect the application of the rule in *Shelly's case*.

9. *SAME—under rule in Shelly's case there is no contingent remainder.* Under the rule in *Shelly's case* there is no contingent remainder which might be destroyed if it did not vest before the termination of the particular estate, since the remainder to the heirs is declared by the rule to be in the ancestor, the same as though it had been expressly given to him and his heirs.

10. *SAME—when the estate in remainder vests at once.* Where there is a limitation to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given; and it is immaterial whether the estate of the ancestor be such as may possibly determine in his lifetime or not.

11. *DEEDS—when rule in Shelly's case applies to deed.* Where a statutory quit-claim deed conveys property to "Joseph Kretzer and Mora Kretzer, his wife, during their natural lives, and after their death to the heirs of said Joseph Kretzer," the rule in *Shelly's case* applies and the husband and wife take as tenants in common during their joint lives with the remainder in fee to the husband, and upon the wife's conveyance of her estate to the husband he becomes vested with the whole title.

APPEAL from the Circuit Court of Macon county; the Hon. W. C. JOHNS, Judge, presiding.

A. C. ANDERSON, for appellants:

The rule in *Shelly's case* applies where there is a devise or grant to two or more persons as tenants in common or as joint tenants and there is a limitation over to the heirs of one of them. Tudor on Real Prop. (4th ed.)

344; 2 Washburn on Real Prop. 556; Fearne on Contingent Remainders, 209; *Bullard v. Goff*, 20 Pick. 252.

It makes no difference as to the operation of the rule whether the remainder is one in expectancy or in possession. Fearne on Contingent Remainders, 209; 2 Washburn on Real Prop. 556.

Whether or not there is a merger is a secondary question, which has no effect on the operation of the rule. Kales on Future Interests, sec. 130; Fearne on Contingent Remainders, 209.

Mr. JUSTICE DUNN delivered the opinion of the court:

A demurrer was sustained to a bill for partition filed in the circuit court of Macon county, the bill was dismissed for want of equity and the complainants have appealed.

The complainants deraign title from Jonas Nye. He conveyed the premises by a statutory quit-claim deed "to Joseph Kretzer and Mora Kretzer, his wife, during their natural lives and after their death to the heirs of said Joseph Kretzer." The Kretzers were afterward divorced and Mora Kretzer conveyed all interest in the premises to Joseph Kretzer, whose title by subsequent conveyances has become vested in the complainants. Joseph Kretzer has two sons, one of whom conveyed his interest in the premises to the other, who was made a party to the bill and filed the demurrer.

Appellants claim to be seized of the premises in fee simple. Whether they are so seized depends upon the question whether the title conveyed by Jonas Nye to Joseph Kretzer was a fee or only a life estate. The language of the deed purports to convey the premises to the grantees during their joint lives and after their death to the heirs of Joseph Kretzer. Appellants claim that this deed is within the rule in *Shelly's case* and conveyed a fee to Joseph Kretzer, subject only to the life estate of Mora Kretzer as a

tenant in common of the premises, and that by the conveyance of her interest the whole estate vested in Joseph Kretzer. No brief has been filed on behalf of the appellees.

Under the rule in *Shelly's case*, which is in force in this State, if an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. The rule is one of the most firmly established rules of property and is unshaken in this State. In determining whether it is applicable in a given case the question does not turn upon the quantity of estate intended to be given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise. (*Vangieson v. Henderson*, 150 Ill. 119; *Ward v. Butler*, 239 id. 462.) When the heir takes in the character of heir he must take in the quality of heir, and all heirs taking as heirs must take by descent. (*Baker v. Scott*, 62 Ill. 86.) The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the first taker. The language of the deed clearly indicates the nature of the estate intended to be given to the heirs of Joseph Kretzer. He is given an estate for life with remainder in fee to his heirs as a class, without reference to individuals or any other condition. The estate thus given to the heirs by the operation of the rule vests in the life tenant.

The requisites of the rule are stated to be, first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate by the name of heirs as a class and without explanation, as meaning sons, children, etc.; third, the estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality,—that is, both legal or both equitable. (*Baker v. Scott*, *supra*;

Ward v. Butler, supra.) All these requisites are present here, viz., a life estate to Joseph Kretzer and a remainder in fee simple to his heirs,—both legal estates created by one deed.

Two reasons suggest themselves which might be urged against the application of the rule: (1) The life estate is in one-half the property only, while the remainder is in the whole; (2) the life estate might be determined by the death of Mora Kretzer in the lifetime of Joseph, thus destroying the remainder by determining the particular estate before the happening of the contingency which would determine the persons who would succeed to the remainder. Neither of these reasons, however, is a valid objection to the application of the rule. It is not a requisite that the estate given to the ancestor and that to the heirs shall be of the same quantity. (*Ward v. Butler, supra.*) The rule has no effect upon the estate given to the ancestor. It affects only the remainder given to the heirs and causes such remainder to vest in the ancestor and not in the heirs. If there is a merger in the ancestor, it follows, not as a necessary result of the operation of the rule, but from the operation of another independent rule of law in regard to separate estates which in any manner become vested in one person. In regard to the destruction of the supposed contingent remainder to the heirs of Joseph Kretzer who can not be known in his lifetime, by the termination of the particular estate before his death, the rule that contingent remainders are destroyed which do not vest at or before the termination of the particular estate has no application. There is no contingency, because the remainder which is expressed to be to the heirs of Joseph Kretzer the law declares to be a remainder to Joseph Kretzer, the same as if it had been made expressly to him and his heirs.

Where there is a limitation to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose

heirs it purports to be given. (*Fuller v. Chamier*, L. R. 2 Eq. 682; *Bullard v. Goffe*, 20 Pick. 252.) The limitation to the heirs must be to the heirs of a person taking a particular estate of freehold, but if it is confined to such heirs then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not. (Watkins on Descent, 162-164; Fearne on Contingent Remainders, (4th ed.) 23-30; 1 Preston on Estates, 313-320; *Rogers v. Down*, 9 Mod. 292; *Merrill v. Rumsey*, 1 Keb. 688.) Fearne states the rule as follows (p. 25): "Whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate,) there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor and does not remain in contingency or abeyance, with this distinction: that where such subsequent limitation is immediate it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates."

The deed of Jonas Nye conveyed to Joseph Kretzer and Mora Kretzer an estate, as tenants in common, during their joint lives with a remainder in fee to Joseph Kretzer. The

conveyance of Mora Kretzer to Joseph Kretzer vested the latter with the whole title.

The court erred in sustaining the demurrer to the bill, and the decree will be reversed and the cause remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

SILAS A. GAUNT, Appellant, vs. JULIA A. STEVENS *et al.*
Appellees.

Opinion filed October 26, 1909.

1. JOINT TENANCY—*joint tenancy defined.* A joint tenancy is where two or more persons have any subject of property, jointly, in which there is unity of interest, unity of title, unity of time and unity of possession.

2. SAME—at common law, words of negation were necessary to avoid creating joint tenancy. At common law a grant or devise to two or more persons without limitations created a joint tenancy, and words or circumstances of negation were necessary to avoid this result.

3. SAME—*survivorship is chief characteristic of joint tenancy.* The doctrine of survivorship is the chief characteristic of joint tenancy; but this doctrine is not in accordance with the spirit of our institutions, and hence in the United States this incident of estates has been abolished except in a few jurisdictions, and in those jurisdictions joint estates are much restricted by statutes.

4. SAME—*act of 1821 practically abolished joint estates in Illinois.* The act of January 15, 1821, which is now found as section 1 of chapter 76 of our statutes, (Hurd's Stat. 1908, p. 1296,) practically abolished joint tenancies in Illinois, except in case of estates held by executors, trustees or others *in autre droit*.

5. SAME—*act of 1827 permitted creation of joint estates by express words.* The act of January 31, 1827, which is now found without substantial change as section 5 of the Conveyances act, (Hurd's Stat. 1908, p. 489,) modifies the act of 1821 (now section 1 of chapter 76 of our statutes) to the extent of authorizing the creation of joint estates possessing common law qualities and incidents, where the words used clearly indicate an intention to create a joint tenancy and not a tenancy in common.

6. *SAME*—*words used must clearly show intention to create a joint tenancy.* While it is not essential to the creation of a joint tenancy that the exact words of section 5 of the Conveyances act be used, yet the intention to create such estate must be so clearly expressed as to leave no reasonable doubt in the mind of the court of the purpose to create the estate.

7. *SAME*—*if a division is contemplated the estate is in common and not joint.* If the instrument creating an estate contains language from which it can be reasonably inferred that the maker contemplated a division of the property among purchasers, or from which it can be seen that a distribution, either in equal or unequal shares, was intended, such language will be held to negate an intention to create a joint tenancy and the purchasers take as tenants in common.

8. *WILLS*—*when will creates a tenancy in common and not a joint tenancy.* A clause of a will by which the testator devises and bequeaths the residue of his estate to his wife and two named daughters, "and to the survivor or survivors of them, share and share alike," creates a tenancy in common and not a joint tenancy, since the words "share and share alike" indicate a contemplated division of the estate among the devisees living at testator's death, which is inconsistent with the existence of a joint estate.

9. *SAME*—*what strengthens view that an estate created by will was not joint.* The view that a clause of a will devising the residue of the testator's property to his widow and two named daughters, "and to the survivor or survivors of them, share and share alike," creates a tenancy in common and not a joint tenancy is strengthened by the fact that a previous clause of the will gave another daughter (the only married one) an estate for life in certain land with remainder to her children, share and share alike, and if she died without children the land should revert to the widow and the two other daughters "in equal proportion."

APPEAL from the Circuit Court of Hancock county;
the Hon. R. J. GRIER, Judge, presiding.

SAMUEL NAYLOR, JR., and SCOTT J. MILLER, for appellant:

A devise to three persons, and to the survivor or survivors of them, share and share alike, is a devise absolute to the takers that are alive at the time of the death of the testator, and the words "survivor or survivors" refer to the

time of the death of the testator, and those living at the time of his death take a fee absolute. 2 Jarman on Wills, 721; Ramson on Wills, sec. 4, p. 209; sec. 6, p. 210; *Summers v. Smith*, 127 Ill. 645; *Convey v. McLaughlin*, 148 Mass. 576; *In re Morgan*, 118 Wis. 177.

Words of survivorship are regarded as intended to provide against the death of the takers of the gift in the lifetime of the testator, and refer to his death. 30 Am. & Eng. Ency. of Law, 808; *Davis v. Davis*, 118 N. Y. 411.

Where the testator does not name a point of time, the words "survivor or survivors" must be presumed to refer to the time from which the will speaks; the time when his will takes effect; the time of his own death; and it is only when the language of the will manifestly requires a different construction that this rule does not apply. *Renner v. Williams*, 71 Ohio St. 340; *Lawrence v. McCarter*, 10 Ohio, 34; *Sinton v. Boyd*, 19 Ohio St. 30; *Kelley v. Kelley*, 61 N. Y. 47; *Goodwin v. McDonough*, 153 Mass. 481; *Blatchford v. Newberry*, 99 Ill. 47; *Robinson v. Jones*, 222 Pa. 56.

Clause 4 of the will does not create an estate in joint tenancy. A joint tenancy cannot, under the laws of the State of Illinois, be created unless expressly declared. *Mittel v. Karl*, 133 Ill. 66; *Slater v. Gruger*, 165 id. 329; *Mustain v. Gardner*, 203 id. 284; Hurd's Stat. chap. 30, par. 5.

O'HARRA & O'HARRA, D. E. MACK, and GEORGE V. HELFRICH, for appellees:

An estate in joint tenancy may be created under the laws of this State by the use of apt language, and the only effect of section 1 of chapter 76 and section 5 of chapter 30 of the Revised Statutes is to change the common law presumption (where the intention is not expressed) that a devise to two or more persons, without adding explanatory words, creates a joint tenancy instead of a tenancy in com-

mon. Under said statutes, and the decisions thereunder, this presumption is precisely reversed. *Mette v. Feltgen*, 148 Ill. 357; *Mittel v. Karl*, 133 id. 65.

The exact language of the statute need not be used to create a joint tenancy, provided the intention to create that estate clearly appears. *Cover v. James*, 217 Ill. 309; *Slater v. Gruger*, 165 id. 329.

The language, "I devise to A B, C D and E F, and to the survivor or survivors of them, share and share alike," is apt language to create the estate of joint tenancy. 2 Jones on Real Prop. sec. 1786; *Stimpson v. Botterman*, 5 Cush. 153; *Mittel v. Karl*, 133 Ill. 65; *Mette v. Feltgen*, 148 id. 357; *Gannon v. Peterson*, 193 id. 372; *Slater v. Gruger*, 165 id. 329; *Mustain v. Gardner*, 203 id. 284; *Cover v. James*, 217 id. 309; *Clark v. Clark*, 2 Vern. Eng. Ch. 323; *Baker v. Giles*, 9 Mad. 157.

If a devise imparts the quality of survivorship to the estate devised the estate is a joint tenancy. The quality of survivorship is the distinguishing feature of the estate of joint tenancy. *Mustain v. Gardner*, 203 Ill. 284; *Mette v. Feltgen*, 148 id. 369; 4 Kent's Com. 360.

It is immaterial in this case whether the language of the fourth clause of the will creates a joint tenancy or a life estate in the first takers with contingent remainder to the survivor. In either case the survivor takes the whole property upon the death of the other two. *Mittel v. Karl*, 133 Ill. 65.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is a bill for partition filed by Silas A. Gaunt in the circuit court of Hancock county for the partition of certain real estate of which John D. Stevens died seized. John D. Stevens departed this life January 3, 1894, leaving a last will, which was duly probated in the county court of Hancock county on January 15, 1894. The only ques-

tion involved in this case concerns the construction to be given to the fourth clause of the will, which is as follows:

"All the rest and residue of my estate, of every nature, kind and description, not hereinbefore devised and bequeathed, I devise and bequeath to my said wife, Julia A., and my two daughters Leonia M. and Almira A., and to the survivor or survivors of them, share and share alike."

The bill alleges that at the time of his death John D. Stevens left surviving him his widow, Julia A., and three daughters, Leonia M., Almira A. Stevens and Clara B. Jackson. In 1898 Leonia M. married appellant, Silas A. Gaunt. Leonia M. Gaunt (*nee* Stevens) died in 1904, intestate, leaving no child or children, but leaving her husband, mother and sisters as her only heirs-at-law. The bill is based on the theory that the fourth clause of the will quoted above created the relation of tenants in common between the widow and the two daughters named in the said fourth clause. A demurrer was sustained to the bill in the court below, and the complainant electing to stand by his bill, the same was dismissed for want of equity.

It is conceded by appellant that if the fourth clause of the will creates a joint tenancy in the devisees therein mentioned he has no interest in the lands described in the bill. Appellees contend that under the fourth clause of the will Leonia M. Gaunt did not take an estate of inheritance as tenant in common with Julia A. and Almira A. Stevens, as is alleged in said bill, but that whatever estate was created in her terminated at her death.

A joint tenancy is where two or more persons have any subject of property, jointly, in which there is unity of interest, unity of title, unity of time and unity of possession. (2 Blackstone's Com. 180.) At common law a grant or devise to two or more persons without limitations created a joint tenancy. (*Aveling v. Knipe*, 19 Ves. 441; Freeman on Co-tenancy, sec. 118.) Words or circumstances of negation were necessary to avoid this result.

The chief characteristic of joint estates is the doctrine of survivorship. (2 Blackstone's Com. 184.) The doctrine of survivorship is not in accordance with the genius of our institutions, hence this incident of estates has been generally abolished in the United States except in a few instances, and in those jurisdictions where joint estates are still recognized they are very much restricted by statutes. *Burnett v. Pratt*, 22 Pick. 557; Warvelle on Abstracts of Title, sec. 247.

As early as January 15, 1821, the General Assembly of this State passed an act "concerning the partition and joint rights and obligations," section 2 of which is as follows: "That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common." The effect of this statute was to practically abolish joint tenancies, except where such estates were held by executors, trustees or others holding estates *in autre droit*. (*Mette v. Felten*, 148 Ill. 357.) This statute has never been expressly repealed but has been retained in all of the revisions of our statutes, and is now found as section 1 of chapter 76 of Hurd's Revised Statutes of 1908. Afterwards, on January 31, 1827, the General Assembly passed an act "concerning conveyances of real property," section 5 of which is as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or

trustees, (unless otherwise expressly declared as aforesaid,) shall be deemed to be a tenancy in common." This section of the act of 1827 has been re-enacted in all of the revisions of our statutes, and is now found, without substantial change, as section 5 of our present act concerning conveyances.

This court decided in *Mette v. Feltgen*, *supra*, that section 5 of the act of 1827 so far repealed, by implication, section 2 of the act of 1821 as to authorize the creation of joint estates possessing the qualities and incidents which the common law attaches to them, where the language of section 5 of the Conveyance act, or other equivalent words, are used clearly indicating an intention to create a joint tenancy. In other words, the effect of section 5 of the act of 1827 was to reverse the common law rule, so that a conveyance to two or more persons creates the relation of tenants in common unless the intention to vest a joint estate is clearly manifested, as provided by section 5 of the act of 1827. The holding in the *Feltgen* case is now the established doctrine in this State. *Slater v. Gruger*, 165 Ill. 329; *Cover v. James*, 217 id. 309.

While it is settled that the exact words of the statute need not be used in the instrument, yet the unfavorable disposition of the legislature toward joint estates has influenced this court in establishing the rule that the intention to create such estate must be so clearly expressed as to leave no reasonable doubt in the mind of the court of the purpose to create such estate. If the instrument contains language from which it can reasonably be inferred that the maker contemplated a division of the property among the purchasers, or from which it can be seen that a distribution, either in equal or unequal shares, was intended, such language will be held to negative an intention to create an estate in joint tenancy and the purchasers will take as tenants in common. (Freeman on Co-tenancy, sec. 23.) In *Mittel v. Karl*, 133 Ill. 65, this court held that

the language, "convey and warrant to Maria Jobst and Michael Jobst, her husband, and the survivor of them, in his or her own right," did not create a joint tenancy under our statute. In discussing this question on page 70 it was said: "But aside from this, it will be observed that our statute in plain language declares that no estate in joint tenancy shall be held or claimed unless the premises shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy. The deed in question contains no such declaration. It provides for a survivorship, it is true, which is regarded as one characteristic of a joint tenancy; but the declaration which the statute requires to establish the estate is nowhere found in the deed, and in the absence of such a declaration we are inclined to hold that the estate was not created." This language may be regarded as somewhat in conflict with the final conclusion reached in that case. However this may be, we think there is no doubt of the soundness of the conclusion that a joint estate was not created by the deed involved in that case.

The only language of the fourth clause of the will now under consideration that gives any color to the claim that a joint estate was intended are the words, "to the survivor or survivors of them." Whether these words, if unlimited in any way, would be sufficient to create a joint tenancy we are not called upon to decide, since in our opinion the words "share and share alike," which immediately follow the words of survivorship, clearly indicate that the testator intended that there should be an equal division between such of the devisees as might be living at his death, which division is inconsistent with the existence of a joint estate.

Our conclusion is, that the fourth clause of the will created the relation of tenants in common between the devisees mentioned in said clause. This conclusion is strengthened by a consideration of the third clause of the will. By that clause the testator devised to another daughter, Clara B. Jackson, for and during her natural life, certain real

estate, which at her death was to go to the heirs of her body in fee, share and share alike, and it was provided that if Clara B. should die without issue or descendants of children then living, then such real estate was to revert in fee to the wife, Julia A., and the two daughters mentioned in clause 4, or the survivors of them, in equal proportions. It will be seen that by the third clause of the will the testator made a provision for the children of his only married daughter by giving them the fee in the real estate which was devised to their mother for her natural life. It is neither reasonable nor natural that the testator would thus provide for his grandchildren, the issue of one daughter, and by the next clause of his will so devise the residue of his estate as to cut off the children of one, and possibly both, of the other daughters. Again, it will be observed that the devise over in clause 3 to the devisees mentioned in clause 4 is in fee, in "equal proportion." It cannot reasonably be contended that the contingent remainder thus given to the wife and the two daughters under clause 3 is a joint estate. It is difficult to believe that the testator would attempt to give the same devisees one part of his estate as tenants in common in fee and another part to the same devisees in joint tenancy.

It follows from the foregoing views that the decree sustaining the demurrer and dismissing the bill is erroneous and will have to be reversed.

The decree of the circuit court of Hancock county is reversed and the cause remanded to that court, with the directions to overrule the demurrer and proceed with the case in accordance with the views herein expressed.

Reversed and remanded, with directions.

VINCENT I. WHITE, Appellant, *vs.* REBECCA H. WHITE,
Appellee.

Opinion filed October 26, 1909.

1. SPECIFIC PERFORMANCE—*proof required where agreement to convey is verbal.* To justify a decree of specific performance of a verbal contract to convey, alleged to have been made by a deceased person, the proof must clearly show that the contract was, in fact, made, and that the promisee, in pursuance of the contract, took possession of the land and made such valuable and lasting improvements as to take the case out of the Statute of Frauds.

2. SAME—*what proof is not sufficient to warrant decree.* Proof of declarations by a deceased person in which he spoke of a certain forty acres as belonging to his son, and proof of the building by the son of hog houses, fences and other improvements on the land, aggregating some \$300 or \$400, during the six years he was in possession, is not inconsistent with the defendant's claim that the son was merely given the use of the land for a hog lot for an indefinite time, and does not warrant a decree specifically enforcing the alleged oral agreement of the deceased person to convey the land to the son, who was the only witness who testified that such contract was made. (*White v. White*, 231 Ill. 298, distinguished.)

APPEAL, from the Circuit Court of Piatt county; the
Hon. W. G. COCHRAN, Judge, presiding.

REED & REED, for appellant.

HICKS & DOSS, and F. M. SHONKWILER, (C. F. MANSFIELD, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is a bill in chancery filed by Vincent I. White against his mother, Rebecca H. White, to compel the specific performance of a parol contract alleged to have been made between complainant and his father, John M. White, Sr., in his lifetime, in which it is charged his father promised to convey to complainant the south-west quarter of the south-west quarter of section 11, township 19, range 6, in

Piatt county. The case was heard below on oral evidence submitted in open court and a decree rendered dismissing the bill for want of equity, to reverse which Vincent I. White has prosecuted this appeal.

In order to warrant a decree in appellant's favor it is indispensable that two propositions shall be established by clear and satisfactory proof: First, that the contract was in fact made between the parties; second, that in pursuance of said contract, and in reliance thereon, appellant entered into possession and has made such valuable and lasting improvements as will take the case out of the Statute of Frauds. *Geer v. Goudy*, 174 Ill. 514.

To establish the existence of the contract, appellant testified on his own behalf that about the last of August, 1901, he was at his father's house, in Monticello, and that his father on that occasion told him that he would give him the forty acres of land in question; that his father said that appellant should go to the north-east corner of said forty and cut out a fence row and put a fence between this forty and another tract which his father owned on the north; that the reason stated by his father for giving appellant this land was that he was too old to build fences and look after it and that he had always intended that forty for appellant; that no one else was present at this conversation, unless his mother, the appellee, heard it, who was six or eight feet away from them, on the porch. J. M. White, Jr., testified that he had been in possession of the forty acres prior to 1901; that his father told him, in the fall of 1901, he had given that forty to appellant and that witness would have to give the land up to Vin and get along without it, and that Vin would build a fence separating this forty from the balance of the land. The evidence shows that the forty acres involved was timber land and uncleared; that the Sangamon river crossed it near the center; that the land was not considered of great value. W. W. Lemon testified that John M. White, Sr., told him

in the winter of 1902 or 1903 that he had given this forty acres to Vin, (meaning appellant,) and would make him a deed some time. John W. Mounts testified that he tried to buy some piling on this land from appellant's father; that he declined to sell it to him, saying the land belonged to Vin and he would have to see him. James Reed, tax collector, testified that John M. White, Sr., asked him if the boys had paid their taxes, and that he told him that they were all paid except on the river forty, meaning the forty acres involved in this suit; that John M. White, Sr., said that forty was Vin's, and if he could not pay the taxes upon it it could sell. John Heath, William Alexander, G. R. Dawson and H. C. White each testify to conversations they had with John M. White, Sr., in which he said, in effect, that he had given this forty acres of land to appellant.

On behalf of appellee, B. R. White, a brother of appellant, testifies that he was present in the latter part of August, 1901, and heard a conversation between his father and appellant in relation to this forty acres of timber land. He testifies that his father said to appellant, "Why don't you raise as fine hogs as Ben does?" Appellant replied, "I would if I had a place to keep them." His father then said, "You can have that forty acres of timber and fence off a hog lot; put in some good fences and have a hog lot down there." They then talked about the amount of work that would be necessary to clear it off and prepare it for a hog lot, and that the fence to be made was spoken of as "a hog-tight fence." He testifies that his father said nothing about giving Vin the land, but merely told him he could fence it off and use it as a hog lot and that he could cut the timber and make the rails and posts. He testifies that appellant was much pleased, and said that it would just suit him and he could make a good hog lot there. This witness also testifies that after the appellant took possession of the forty acres in question witness applied to his father to get some fence posts off this land, and that his father said to

go on and get as many posts as he wanted; that he made 300 posts on this land and hauled away 210 of them, when Vin objected to his taking the posts; that he told Vin his father gave him permission to get them; that he reported Vin's objections to his father, and his father said that Vin did not own the land; that he was just a renter there by permission, and that the only rent he paid was the taxes on it. It is also shown that John M. White, Sr., made a contract with the road commissioners by which he settled for \$97 damages to this forty by making a public road on one side of it. Three witnesses testify that in November after the death of John M. White, Sr., which occurred in May, 1906, appellant went to Lafayette, Indiana, where his mother was visiting with her daughter, Mary D. Williams, for the purpose of renting this forty acres of land; that appellee wanted \$120 a year but appellant thought that was too much; that appellant was willing to give her \$40 a year, which he thought was enough in view of the improvements he had made on the place; that appellant finally gave his mother his note for \$40 for the use of the forty acres for one year and agreed to do from \$30 to \$40 worth of work in the way of improving the land. It is shown that on January 11, 1906, John M. White, Sr., executed a deed conveying this forty acres of land to appellee. It also appears that appellant made an unsuccessful effort to rent the forty acres the second time from his mother, but, failing to agree, appellee rented the land to another person, but appellant refused to deliver the possession and was still in possession when this suit was commenced. One witness testifies that appellant said that if John White won his suit against his mother appellant was going to make a bluff and try to get pay for the improvements he had made on the river forty. This conversation is denied by appellant. The evidence shows that appellant took possession of the land in question, fenced it, cleared off twelve or fourteen acres and built two hog houses, estimated to be worth from \$35 to

\$50. The total value of all the improvements made by appellant during the six years that he had possession of the land is estimated at from \$300 to \$400, and in addition to this appellant paid the taxes on the land up to the year 1907.

The evidence as to a promise of John M. White, Sr., to give this land to appellant falls short of the legal requirements. No one testifies to the promise except the appellant. The statements of the several witnesses that John M. White, Sr., spoke of this land as belonging to appellant or referred to it as belonging to Vin are not necessarily inconsistent with the claim set up by appellee that her husband merely gave appellant permission to take possession of this forty acres and use it as a hog lot. The nature and value of the improvements put upon the land by appellant are such as one might reasonably be expected to make upon land of which he had the free use for an indefinite time.

Another son of John M. White, Sr., brought a similar bill against his mother to compel a conveyance to him of 175 acres near Monticello, Illinois. That case was brought to this court by appellee in this case. The decree granting John M. White, Jr., the prayer of his bill was affirmed by this court, and the case is reported as *White v. White*, 231 Ill. 298. That case is the one referred to by the witness Williams where he testified that appellant said, "If John wins his case I intend to make a bluff to get pay for the improvements put upon the river forty." The case at bar is readily distinguished in its facts from the former case. The court that tried this case heard the witnesses and had opportunities for determining their credibility which we do not enjoy. We are not prepared to say that the decree is so clearly against the weight of the evidence upon either branch of the case as to require a reversal.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

MAY S. OGDEN, Appellee, vs. ALBERT P. STEVENS,
Appellant.

Opinion filed October 26, 1909.

1. LACHES—*laches must be set up in answer.* While the defense of *laches* may be raised by demurrer in certain cases, yet if the defendant answers the bill and fails to set up *laches* he will not be allowed to insist upon such defense on the hearing.

2. STATUTE OF FRAUDS—*a verbal agreement to extend time for redemption is valid.* A verbal agreement to extend the time for redemption from a judicial sale is valid and is not affected by the Statute of Frauds.

3. MORTGAGES—*equity will permit redemption where owner of equity of redemption has been misled.* A court of equity will permit redemption from a judicial sale where the owner of the equity has been misled by the course of conduct and representations of the purchaser and has been induced by such fraudulent representations or promises to refrain from redeeming until the time for redemption has expired.

4. SAME—*when equity will grant redemption.* A court of equity will grant redemption from a foreclosure sale where the evidence shows that the purchaser permitted the owner of the equity to make expenditures for taxes, improvements and in defending litigation, knowing that such expenditures were being made in reliance upon his promise to permit redemption after the statutory period had expired.

5. EQUITY—*court of equity will look to substance rather than form.* A court of equity will look to the substance rather than the form of a written instrument, and will seek to discover and carry into effect the real intention of the parties and enforce it according to the sense in which it was understood by the parties as shown by subsequent acts and conduct with reference thereto.

6. APPEALS AND ERRORS—*the chancellor's findings from oral testimony are not lightly set aside.* Where the chancellor has heard the testimony by the witnesses in open court, his findings upon disputed questions of fact will not be disturbed, on appeal, unless manifestly against the weight of the evidence.

7. INTEREST—*when interest should not be decreed.* The mere fact that the purchaser of property at a foreclosure sale, after the period for redemption has expired, refuses to concede the right of the owner of the equity of redemption to redeem and defends a

suit in equity to enforce such right, does not justify a provision of the decree that such purchaser shall account for interest on certain condemnation money for part of the premises, deposited with the county treasurer after the suit was begun.

APPEAL from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding.

COLL McNAUGHTON, and JOHN W. DOWNEY, for appellant.

EDDY, HALEY & WETTEN, (P. C. HALEY, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This was a bill filed by May S. Ogden in the circuit court of Will county against Albert P. Stevens and Jerome P. Stevens to obtain a decree permitting her to redeem certain premises from a sale made under a decree entered in said court on the 25th day of September, 1897. Albert P. Stevens answered the bill, denying the principal allegations upon which the complainant predicated her right to relief. Jerome P. Stevens filed an answer disclaiming all interest in the premises, and his connection with the litigation was terminated. Upon a hearing of the evidence in open court a decree was entered in accordance with the prayer of the bill, permitting the complainant to redeem lots 4, 5 and 8, in block 1, of school section addition to the city of Joliet, as prayed for in the bill, upon the payment of the balance which might be found due the defendant upon an accounting to be had before the master in chancery in accordance with the specific directions of the decree, and the cause was referred to the master in chancery to state the account between the complainant and defendant and to report his conclusions of law and fact in relation to the matters of accounting so referred to him. The defendant has appealed from this decree and urges a reversal thereof for the reasons hereinafter stated.

The facts disclosed by the evidence show that prior to September 6, 1884, the premises in question were owned by Marshall B. Ogden, who died testate on said date, and by his last will the premises involved were devised to his son, Edwy C. Ogden, husband of appellee. At the time of the death of Marshall B. Ogden there was a mortgage on said premises in favor of William C. Ogden for \$1697.50. On July 15, 1892, Edwy C. Ogden executed a trust deed to William Grinton to secure a loan of \$6000 obtained from Henry K. Stevens, father of the appellant, who thereafter made a gift of said note and trust deed to appellant. The \$6000 note was payable to Edwy C. Ogden five years after date and was by him endorsed. The note drew interest at the rate of seven per cent per annum. On August 9, 1893, Edwy C. Ogden conveyed his equity in said property to M. D. Ogden. On August 17, 1896, the holder of the note elected to declare the principal sum due because of a default in the payment of interest and filed a bill in the circuit court of Will county to foreclose the same. In December, 1896, while the foreclosure proceeding was pending, Edwy C. Ogden intermarried with the appellee, May S. Ogden, and on June 15, 1897, M. D. Ogden, for the consideration of \$2300, conveyed his equity in said lots to appellee, May S. Ogden. The foreclosure proceeding resulted in a decree on September 25, 1897, for the sum of \$7621.79. The decree not having been satisfied, the premises were sold on the 25th of October, 1897, to appellant for \$7795.99, in full satisfaction of the decree, and the master in chancery executed to appellant a certificate of purchase entitling him to a deed on January 25, 1899, unless redemption should be made. William C. Ogden, who claimed to be the owner of the note for \$1697.50, secured by a mortgage upon a part of these premises, was not made a party to the foreclosure of the trust deed. On January 5, 1897, and during the pendency of the foreclosure proceeding, William C. Ogden filed an original bill in the Will county circuit court to foreclose

his mortgage. Appellant and Edwy C. Ogden and others were made parties defendant to the bill filed by William C. Ogden. Appellee was not made a party to this bill. The William C. Ogden bill was dismissed by the circuit court of Will county for want of equity on April 22, 1898, which was about six months after the sale under the foreclosure of the trust deed. William C. Ogden appealed from the decree dismissing his bill to the Appellate Court, where the decree was affirmed December 14, 1898, before the time for redemption had expired from the sale under the decree of foreclosure of the trust deed. William C. Ogden prosecuted a further appeal to this court, and the judgment of the Appellate Court was affirmed by the Supreme Court on June 17, 1899. A petition for rehearing was filed by William C. Ogden and was not finally disposed of until October 5, 1899, which was several months after the expiration of the time allowed by the law for a redemption from the trust deed foreclosure sale. Both appellant and appellee were interested in defeating the foreclosure proceeding instituted by William C. Ogden. The evidence shows that appellee employed and paid counsel to defend against that foreclosure proceeding and that the defense was successfully interposed without any cost to appellant.

The foregoing facts are undisputed. The controversy between the parties relates entirely to facts now to be stated.

Appellee contends that she intended to redeem from the sale under the trust deed; that she had frequent conversations with appellant in regard to the redemption of the premises, and that the appellant assured her that all he wanted was the money that he had invested and the interest thereon, and that appellant frequently promised to accept his money and permit a redemption, both before and after the master's deed was issued to appellant. Appellant denies ever having made any such promises to appellee.

On February 1, 1899, Morrill Sprague, an attorney at the Will county bar, who had represented the defense in

the William C. Ogden litigation, at the request of appellee's husband and appellant made an itemized statement of the amount necessary to redeem from the trust deed foreclosure, from which it appears that at that time there was due for principal, interest, insurance, taxes and costs, \$8974.18. At that time it was estimated by Mr. Sprague that it would probably be nine months before the William C. Ogden litigation would be finally disposed of. For the purpose of preserving appellee's right to redeem after the termination of the William C. Ogden litigation, on the said first day of February, 1899, two instruments in writing were prepared by Mr. Sprague and executed between appellant and appellee. One of these instruments on its face purports to be a contract of sale, by which the appellant agreed to sell the premises to appellee for the sum of \$8974.18, provided said sum of money, with six per cent interest thereon, was paid to him at any time within nine months from that date. The contract also provided that appellee should pay appellant as rentals on the premises \$100 per month, in advance, for a term of nine months, with the understanding that if appellee paid the \$8974.18 within the time limit she should have credit for the amount paid as rentals. The other instrument executed between the parties was an ordinary lease, by which appellant leased the premises to appellee for a rental of \$100 per month. The evidence shows that appellee continued in the possession of the premises and paid the \$100 per month for eight consecutive months, and that before the ninth payment came due appellant went to Mount Clemens, Michigan, for treatment for rheumatism, and that he was not at home to receive the \$100 or the balance of the money under the contract, although appellee, her husband and her attorney made repeated efforts to make such payment and close up the transaction. On one occasion after appellant returned home appellee was denied admittance to his home on the ground that appellant was too ill to be seen about business affairs. Finally, in November,

after the nine months had expired, appellant had an interview with Mr. Sprague and the appellee's husband, and he again assured them that he was willing to carry out the contract and receive his money although the time under the written agreement had expired, and on this occasion appellant received a certified check for the ninth \$100 payment.

The evidence shows that the equity in these premises was worth from \$10,000 to \$20,000, and that appellee had made a tentative arrangement with Mr. O'Connor, a broker, to furnish her the necessary money to make a redemption of the property. Appellee's husband had also obtained a promise from another loan agent who was willing to furnish the money for the redemption and take a mortgage upon the property. Appellee informed appellant that she had such arrangements made for the money and was ready and willing at any time to pay him all that was due him, but appellant told her that there was no hurry about the redemption; that he did not need the money, and that she might just as well pay him interest as to pay it to some other person. The weight of the evidence shows that on all of these occasions appellant recognized his obligation to take the money and release the property. During the time that appellee was occupying the premises, and while relying on appellant's promise to accept his money, appellee spent about \$2500 in taxes, expenses and improvements upon the premises. No payments were made and none were demanded from November, 1899, until March, 1900. On the latter date appellant called on appellee and presented a written lease for the premises and requested her to sign it. Appellee declined to sign the lease, and told appellant that she wanted him to take his money and release the property. Appellant replied that he did not want his money at that time and that there was no need of going to the trouble just then; that he thought he would reduce the rent to \$50 a month, and that it would not make any difference about their arrangement as to the redemption, and with

this understanding appellee signed the lease, agreeing to pay \$50 per month as rent. During the succeeding summer appellant called at the store of appellee's husband frequently, and on these several occasions appellee insisted upon a settlement and appellant's accepting what was due him and releasing the property to her, but appellant, while not refusing to comply outright, was always ready with some excuse for not settling it then. In November of that year appellant came to the drug store kept by appellee's husband, and appellee having become suspicious that appellant did not intend to carry out his promise, presented him with a large amount of money, purporting to be the amount due him, and demanded that he release his claim upon the property. Then for the first time appellant flatly refused, stating that he preferred the property to the money. An altercation thereupon occurred between appellant and appellee's husband, in which offensive language was used. This was the last friendly interview between the parties. Within a short time thereafter Jerome P. Stevens, a brother of appellant, notified appellee that he had bought the property and that he wanted possession. Written notices to quit were served and legal proceedings threatened, until finally appellee surrendered the possession to Jerome P. Stevens. Afterwards Jerome P. Stevens let the property go back to appellant, and, as already stated, disclaims all interest therein at this time.

After the commencement of this suit the Chicago, Rock Island and Pacific Railway Company obtained a right of way over a portion of two of the lots involved, and has, pursuant to the order of the county court, deposited \$12,500 with the county treasurer of Will county, which remains on deposit there, representing the land condemned by the railroad company, the title to which will abide the decision of this case.

The original bill was filed in this case on January 21, 1905. Appellant contends that appellee has been guilty of *laches* in commencing this suit. The city of Joliet passed

an ordinance requiring railroads to elevate their tracks. In order to comply with this ordinance the Chicago and Rock Island company re-located a portion of its line across two of the lots involved, which, it is claimed, greatly enhanced the value of the property. Appellant contends that the filing of the bill in this case is an afterthought, due to the unusual advance in the value of the property. It is sufficient to reply to this contention that appellant does not set up the defense of *laches* in his answer, and the rule has been frequently announced by this court that the defense of *laches*, to be availed of, must be set up by plea or answer, so as to afford complainant an opportunity to amend the bill by inserting allegations accounting for the delay. (*Corryell v. Klehm*, 157 Ill. 462; *Spalding v. Macomb and Western Illinois Railway Co.* 225 id. 585; *Schnell v. City of Rock Island*, 232 id. 89.) There are cases where the question may be raised by demurrer. (*Kerfoot v. Billings*, 160 Ill. 563.) But where a defendant answers a bill and fails to set up *laches* he will not be allowed to insist upon such defense on the hearing.

It is next contended by appellant that his several promises relied on by appellee were void under the provision of the Statute of Frauds, which is set up and relied on in his answer. This position is untenable. A verbal agreement to extend the time for redemption from a judicial sale is valid and not affected by the Statute of Frauds. (*Reigard v. McNeil*, 38 Ill. 400; *Pensoneau v. Pulliam*, 47 id. 58; *Union Mutual Life Ins. Co. v. White*, 106 id. 67; *Taggart v. Blair*, 215 id. 339.) A parol contract to extend the period of time allowed for a redemption from the judicial sales has been upheld and enforced by this court in a number of cases. (*Schoonhoven v. Pratt*, 25 Ill. 379; *Nichols v. Otto*, 132 id. 91; *Union Mutual Life Ins. Co. v. Kirchoff*, 133 id. 368.) Courts of equity, in the exercise of their jurisdiction, have gone even further than the enforcement of clearly proven verbal contracts for the extension of a

period of redemption, and have granted relief where the purchaser has by a course of conduct induced the owner to refrain from redeeming within the statutory time by fraudulent representations or promises to the purchaser which could not be said to constitute a contract. (*Henderson v. Harness*, 184 Ill. 520.) Where the owner of the equity has been induced to rely upon the representations of the creditor until the period of redemption has expired, a court of equity will grant relief. (*Taggart v. Blair*, *supra*.) The defense that the alleged contract is void under the Statute of Frauds cannot be sustained.

Appellant's most serious contention is that the decree is not supported by the evidence. The weight of the evidence supports the facts set out in this opinion. Appellee is corroborated by several witnesses as to the promises of appellant that he would accept the money due and release these premises. That such was the understanding is shown by the evidence of Mr. Sprague, who at the request of the parties prepared a statement showing the exact amount necessary to redeem these premises on February 1, 1899, the day that the written contracts were made. Mr. Sprague testifies that the parties entered into those contracts for the purpose of preserving appellee's equities and extending her right to redeem until the litigation concerning the William C. Ogden mortgage was determined; that the parties had no other object in view in executing the lease and the so-called sale contract. That appellee understood that she had a continuing right to redeem is shown by the expenditure of money for taxes, improvements and in defense of litigation concerning the property. It would not be reasonable that an intelligent person would thus spend large sums of money upon property which belonged to another. Appellant was cognizant of these expenditures, and he knew appellee was relying upon his promises in making them. Under these circumstances it would be a fraud upon appellee to thus induce her to expend money in the belief that

she had a right to redeem and then refuse to receive the money and release the property. Under the evidence disclosed in this record appellee's right to redeem might well be rested upon the doctrine of estoppel.

Appellant insists that by the strict letter of the written contract appellee only had an option to purchase the property within nine months, which she did not exercise, and that thereafter she had no further rights in the premises. Conceding that the written instruments executed on February 1, 1899, are susceptible of the construction contended for by appellant, still courts of equity look to the substance rather than to the form of written instruments, and will seek to discover and carry into effect the real intention of the parties and enforce it according to the sense in which it was understood by the parties, as shown by their subsequent acts and conduct with reference thereto. (Pomeroy's Eq. Jur. sec. 378.) The question now under consideration being one of disputed fact, the finding of the trial judge to whom the cause was submitted for trial is entitled to great weight with this court. The witnesses were before the chancellor and he had opportunities for observing their demeanor while testifying which we do not have. In such case the rule is that the finding of the trial court will not be set aside unless it is manifestly against the weight of the evidence. (*Higgins v. Wisner*, 170 Ill. 220.) We are not, however, required to invoke this rule in the case at bar. If the question were pending as an original proposition in this court we could not reach any other conclusion than that the weight of the evidence supports the allegations of appellee's bill. We are entirely satisfied with the result reached in the court below, but are of the opinion that the court erred in reference to the matter of interest in one respect. The court directed that appellant be required to pay interest at the rate of six per cent on the \$12,500 deposited by the railroad company with the county treasurer. To require the appellant to pay interest on this sum of money is

to inflict upon him a penalty for defending this lawsuit. While it is true that appellee is entitled to this money and would have received it when it was paid over had appellant then conceded appellee's claim and released all right to the property, still we do not think appellant should be mulcted in damages beyond the ordinary court costs, merely because he has sought to have his rights litigated. The decree of the circuit court will be reversed in this respect, so that the master, in stating the account, will not charge appellant with interest on the \$12,500. In all other respects the decree of the circuit court will be affirmed.

Decree reversed in part and cause remanded.

THE CITY OF PRINCETON *et al.* Appellants, *vs.* JOHN A. GUSTAVSON, Appellee.

Opinion filed October 26, 1909.

1. HIGHWAYS—*what is necessary to establish a public street by dedication.* To establish a public street by dedication there must be an intention on the part of the owner of the land to dedicate it to the public for street purposes and an acceptance of the offered dedication by the public, and the proof of such offer and acceptance must be clear, satisfactory and unequivocal.

2. SAME—*there can be no acceptance by public of offer not to public.* Where the proposed dedication of a strip of land by the owners is for the benefit of private parties and not for the public there can be no acceptance of the offer by the public such as will constitute the strip of land a public street by dedication.

3. SAME—*what is necessary to establish a public street by prescription.* In order to establish a public street by prescription the use and enjoyment of the land claimed as a street must have been adverse, under a claim of right, exclusive, continuous, uninterrupted and with knowledge and acquiescence of the land owner.

4. SAME—*the use for which land was set apart is presumed to continue.* Where land is set apart by the owner thereof as a private way, the use of the land for such purpose will be presumed to have been in accordance with the original intent of the parties until the contrary is proven.

5. INJUNCTION—*when allowance of \$300 as damages on dissolution is not excessive.* An allowance of \$300 as damages upon the dissolution of an injunction will not be regarded as excessive, where it is within the range of the testimony and merely reimburses the defendant for the solicitor's fees which he has expended or agreed to pay in procuring such dissolution.

APPEAL from the Circuit Court of Bureau county; the Hon. RICHARD M. SKINNER, Judge, presiding.

IRA C. GIBONS, City Attorney, and GEORGE S. SKINNER, for appellants.

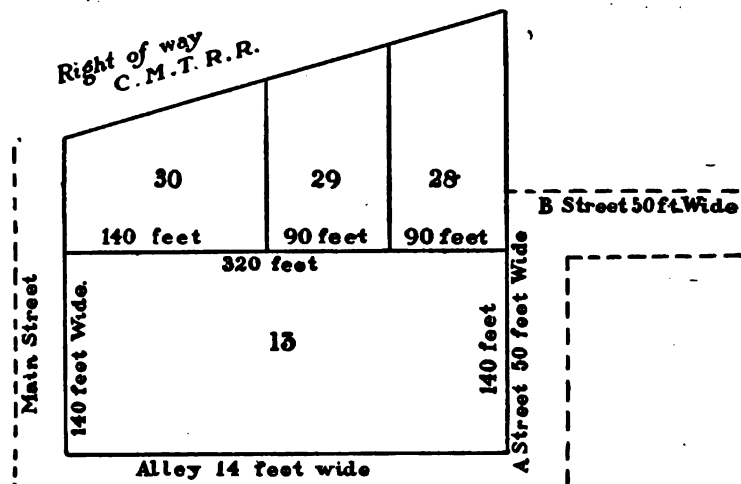
WATTS A. JOHNSON, and J. L. SPAULDING, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

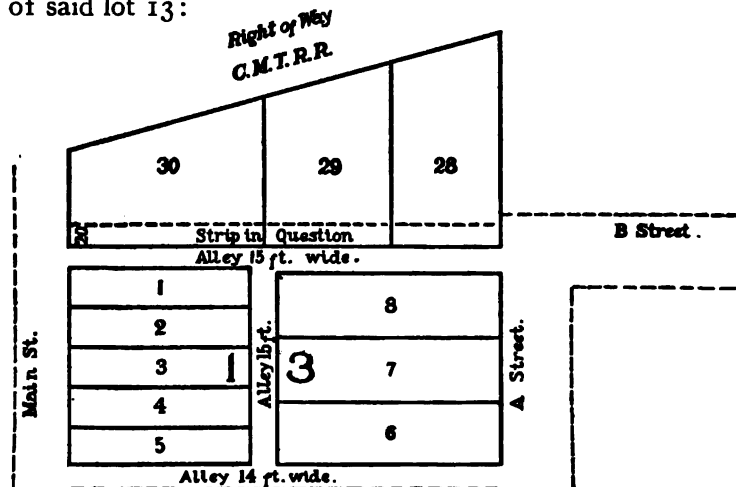
This was a bill in chancery filed by appellants against the appellee, in the circuit court of Bureau county, to enjoin the appellee from erecting a building and pair of scales upon the south twenty feet of lot 30, in Stoner's addition to the city of Princeton, which south twenty feet of lot 30, upon which said building and scales were proposed to be located, is alleged to be a part of one of the public streets of said city. An answer and replication were filed and a hearing was had before the chancellor, and a decree was entered dismissing the bill for want of equity and assessing the appellee's damages at \$300, and the complainants have prosecuted an appeal to this court.

It appears from the record that in 1854, and before the land in question was platted, the owners thereof sold and conveyed what is now lot 28 of Stoner's addition to the city of Princeton to Robert T. Templeton, describing the same by metes and bounds, and which conveyance contained the following provision: "Said parties of the first part further agree to and with the party of the second part that he is to have the right of way of twenty feet in width on the south line of said acre above referred to, from Main street to said lot herein deeded." The following plat shows

the situation of lots 13, 28, 29 and 30, and the adjoining streets, of Stoner's addition to Princeton:



And the following plat shows the situation of that part of Stoner's addition to Princeton after lot 13 had been subdivided and a fifteen-foot alley laid off upon the north line of said lot 13:



The strip of land in controversy is the twenty-foot strip lying immediately north of the fifteen-foot alley laid off

across the north side of lot 13, and runs from Main street to B street, a distance of three hundred and twenty feet, across the south end of lots 28, 29 and 30. The deeds through which the present owners claim title to lots 28, 29 and 30, with few exceptions, contain provisions similar to the deed for lot 28 to Robert T. Templeton. In about the year 1858 a lumber yard was located upon lot 28, a flouring mill upon lot 29 and an elevator upon lot 30. In 1867 the lumber yard, flouring mill and elevator were destroyed by fire. Since the fire of 1867 lots 28, 29 and 30 have had no substantial improvements thereon, they having been at different times occupied by coal sheds, chicken houses, corn-cribs, etc. During the time the lumber yard, flouring mill and elevator were located upon said lots the public traveled to and from said lots over the said alley and the adjoining twenty-foot strip, and since that time the thirty-five foot strip has been used as a passageway between B street and Main street by the public and by the owners of said premises and to accommodate the different classes of business located on said premises.

The bill is filed on the theory that said twenty-foot strip is a part of a public street, and is not filed for the purpose of establishing the right of the respective owners of lots 28 and 29 to use said twenty-foot strip as a private way, as a means of ingress and egress to and from their lots from Main street or from B street.

The right to a public street may be acquired (1) by compliance with the provisions of the statute with reference to laying out and establishing public streets; (2) by dedication; and (3) by prescription. There is no claim that the statute has been complied with whereby a public street has been established over said twenty-foot strip. If, therefore, there is a public street over said twenty-foot strip it must be by dedication or prescription.

To establish a public street by dedication three things must intervene: (1) An intention on the part of the owner

of the land to dedicate the same to the public for street purposes; (2) an acceptance of the offer to dedicate the land for street purposes by the public; and (3) the proof as to the offer of dedication by the owner, and the acceptance of such offer by the public, must be clear, satisfactory and unequivocal. In this case the record shows that the dedication of the twenty-foot strip was made by the owners for the benefit of the proprietors of such lots and not for the benefit of the public. We think it clear, therefore, under the doctrine announced by this court in *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368, *City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 id. 561, and *City of Chicago v. Borden*, 190 id. 430, there was no offer to dedicate said twenty-foot strip to the public for a public street, and that there could, therefore, have been no acceptance thereof by the public.

In order to establish a street by prescription the use and enjoyment of the land claimed as a street must have been adverse under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land. (*City of Chicago v. Chicago, Rock Island and Pacific Railway Co. supra.*) In this case the strip was originally set apart by the owners thereof as a private way, and the use thereof will be presumed to have been in accordance with the original intent of the parties. In *Illinois Ins. Co. v. Littlefield, supra*, it was said (p. 373): "The use will be presumed to have been in accordance with the intention of the owner, and when the way is opened as a private passway, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued."

We are of the opinion that the evidence wholly fails to establish said twenty-foot strip to have been acquired by the public as a public street by prescription. The use of said twenty-foot strip, as disclosed by the evidence, is entirely consistent with the view that its use was merely per-

missive. We are of the opinion, therefore, that the trial court properly dismissed the bill.

The court, on the dissolution of the injunction, allowed the appellee, as damages, the sum of \$300. This amount was fairly within the range of the testimony, and only reimbursed appellee for the solicitor's fees which he had expended or agreed to pay in procuring a dissolution of the injunction, and was not excessive. *Lambert v. Alcorn*, 144 Ill. 313; *Dempster v. Lansingh*, 234 id. 381.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* John E. George, County Treasurer,
Appellant, *vs.* J. N. NELMS, Admr., Appellee.

Opinion filed October 26, 1909.

1. INHERITANCE TAX—*section 2 of Inheritance Tax act does not exempt remainders after life estates.* Section 2 of the Inheritance Tax act is not intended to exempt remainders after life estates, but only certain life estates as specifically provided in that section.

2. SAME—*what is the "beneficial interest" of a child in real estate.* Under section 1 of the Inheritance Tax act, where a person dies intestate, leaving a widow and one child, the "beneficial interest" of the child in the real estate is the value of such real estate after deducting the cash value of the widow's dower therein. (*In re Estate of Kingman*, 220 Ill. 563, explained.)

3. SAME—*person should be taxed only on the beneficial interest he receives.* The intention of the legislature, as evidenced by sections 1 and 2 of the Inheritance Tax act, is that a person shall be taxed only on the beneficial interest which he receives.

APPEAL from the County Court of Christian county;
the Hon. J. H. MORGAN, Judge, presiding.

ARTHUR YOCKEY, State's Attorney, (LESLIE J. TAYLOR, and JAMES M. TAYLOR, of counsel,) for appellant:

No deductions can be made for the intermediate estate of the widow in the total appraised value of the realty tax-

able under the law, in fixing the amount of the inheritance tax to be assessed against the lineal heir. *In re Estate of Kingman*, 220 Ill. 563; Hurd's Stat. chap. 120, sec. 366.

Under the law there can be no deductions made for a life estate or any intermediate estate, except where the remainder goes to the collateral heirs, to a stranger to the blood or to a body politic or corporate, in which case the value of the preceding estate is first to be deducted and the tax extended on the remainder, only. *In re Estate of Kingman*, 220 Ill. 563.

The clause in section 1 of the Inheritance Tax act, "or remainder to the collateral heir," etc., should be read "and remainder," etc. *Billings v. People*, 189 Ill. 472; *Ayers v. Title and Trust Co.* 187 id. 42.

JAMES H. FORRESTER, (W. H. NELMS, of counsel,) for appellee:

Upon the death of a person intestate, leaving a widow and a sole lineal heir him surviving, in fixing the amount of the inheritance tax to be paid by the widow there is no exemption from the tax in favor of the widow, for the intermediate life estate of the widow, by virtue of her right of dower, but instead the same is immediately chargeable as taxable property against the widow upon the death of the decedent. *Billings v. People*, 189 Ill. 472; *Ayers v. Title and Trust Co.* 187 id. 42.

Upon the death of a person intestate, leaving him surviving a widow and a sole lineal heir, in fixing the amount of the inheritance tax to be assessed against the lineal heir a deduction should be made of the cash value of the life estate of the widow, taken by her by virtue of her right of dower, from the total appraised value of all the realty of which the decedent died seized. *Billings v. People*, 189 Ill. 472; *Ayers v. Title and Trust Co.* 187 id. 42; *In re Estate of Kingman*, 220 id. 563.

Mr. JUSTICE CARTER delivered the opinion of the court :

This is an appeal from the judgment of the county court of Christian county fixing the inheritance tax on the beneficial interest received by Lillian E. Barnes from the estate of her father, William E. Barnes. The latter died intestate October 1, 1907, leaving him surviving his widow, Beulah May Barnes, and one child, the said Lillian E. The personal property was valued at \$21,450.38 and the real estate at \$29,303. The cash value of the widow's dower in said real estate was fixed at \$6648.85. The only question involved in this appeal is whether the cash value of the widow's dower should have been deducted from the beneficial interest of the daughter in the real estate in fixing her inheritance tax. The county court deducted the amount. From that judgment this appeal was perfected.

Under section 1 of the Inheritance Tax law (Hurd's Stat. 1908, p. 1819,) it is provided that when the beneficial interest to any property or income therefrom shall pass by will or by the intestate laws of this State to or for the use of any child of the testator or intestate such interest shall be subject to the tax. What is the beneficial interest received by the daughter? This court has held in *Billings v. People*, 189 Ill. 472, that the dower interest of the widow is subject to the tax. Beyond question the beneficial interest that the daughter receives in the real estate left by her father is the value of such real estate after deducting the cash value of the widow's dower.

It is earnestly argued that this court held in *In re Estate of Kingman*, 220 Ill. 563, that such dower interest should not be deducted in fixing and taxing the value of the remainder that is to go to the daughter. The estate in that case was for years and not for life, and while there are some expressions in the opinion that tend to support appellant's argument in this regard, the question here under discussion was not involved or decided in that case. Sec-

tion 2 of the Inheritance Tax law is not intended to exempt remainders after the life estate, but only certain life estates as specifically provided in that section. It is, however, provided in that section that the person who receives the remainder after such life estate shall not be compelled to pay the tax immediately, if he desires to give a bond that the tax will be paid when he comes into actual possession of the property. In *Ayers v. Chicago Title and Trust Co.* 187 Ill. 42, this court, in discussing the meaning of section 2, said (p. 54): "We hold that the right to succession, under a will, to an estate in remainder is liable to be taxed, the valuation to be made as of the date of the death of the testator, and the value to be taken of the estate of the decedent less the value of the life estate, and where the remainder-men do not or cannot make an election, as provided by section 2, the tax must be paid in accordance with the provisions of that section. We further hold that where, as under the provisions of the will in this case, there is no provision for the remainder going to collateral relatives * * * there is no one to make an election and the tax on the remainder becomes due."

Obviously, under sections 1 and 2 of the Inheritance Tax law as construed by this court in the cases heretofore cited, the legislature intended that a person should be taxed only on the beneficial interest that he receives. The only beneficial interest in the real estate that passed to the daughter in this case from her father's estate was the value of this real estate less the value of the dower interest of the mother. The county court decided rightly in deducting the cash value of said dower when fixing the beneficial interest received by and taxed against the daughter.

The judgment of the county court will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* J. James O'Connor, Relator, *vs.* JOSEPH F. HAAS *et al.* Respondents.

Opinion filed October 26, 1909.

This case is controlled by the decision in *People v. Strassheim*, 240 Ill. 279.

ORIGINAL petition for *mandamus*.

SHURTLEFF & HEIZER, for relator.

HARRY A. LEWIS, and WILLIAM F. STRUCKMANN, for respondent Haas; MANN & MILLER, for other respondents.

Per CURIAM: This was an original proceeding commenced in this court for a writ of *mandamus* to compel Joseph F. Haas, as county clerk of Cook county, to cause to be printed upon the primary ballots of the republican party in Cook county, for the primary election to be held on the 13th day of April, 1909, the relator's name as a candidate for circuit judge, and involved the construction of certain provisions of "An act to provide for holding primary elections by political parties," usually called the "Primary Election law of 1908."

Since this case was taken under advisement an opinion has been filed in the case of *People v. Strassheim*, 240 Ill. 279, wherein said act was held to be unconstitutional and void. It will therefore be unnecessary to consider the questions argued by the respective parties in the briefs filed in this cause, and the writ of *mandamus*, as prayed for, will be denied.

Writ denied.

WALTER O'ROURKE, Appellee, vs. ELLIOTT W. SPROUL,
Appellant.

Opinion filed October 26, 1909.

1. PLEADING—*after verdict all intendments are to be taken in favor of the pleading.* After verdict, on motion in arrest of judgment or on appeal, everything which by fair and reasonable intendment may be inferred from the general averments of the declaration will be presumed.

2. SAME—*when declaration in personal injury case is sufficient after verdict.* A declaration averring that the defendant was engaged, as a contractor, in doing certain work upon a building of which he was not the owner, and that the plaintiff, though not employed by the defendant, was employed to do certain other work upon the same building, raises the implication, which is sufficient after verdict, that the plaintiff was employed by some one having authority and that he was working in the building in pursuance of such employment.

3. NEGLIGENCE—*contractor owes duty to other persons working on same building.* One engaged in the construction of a building as a contractor owes to other persons, not his employees, at work upon the same building and using reasonable care for their own safety, the duty of using reasonable care to avoid injuring them.

4. SAME—*when question of assumed risk is not involved.* As between a contractor engaged in constructing a building and a person, not his employee, who is at work upon the same building, no such relation exists as will relieve the contractor from liability for an injury to such person occasioned by the contractor's negligence, and the question of assumed risk is not involved.

5. SAME—*person not bound to anticipate that another will be negligent.* One employed upon a building is not bound to anticipate that servants of another master doing other work upon the same building will perform their work in a negligent manner, and it is a question for the jury, under the evidence, whether he had any reason to anticipate danger to himself in the absence of negligence upon the part of the other servants.

6. INSTRUCTIONS—*instruction may assume what could not be controverted.* It is not error for an instruction in a personal injury case to assume that the plaintiff was rightfully working on a certain building and that the defendant owed a duty to exercise care not to injure him, where there could be no controversy, on the evidence, as to such matters.

7. APPEALS AND ERRORS—*when error in refusing to admit testimony is harmless.* Error in refusing to allow a witness to testify on a certain point is not prejudicial, where such testimony, had it been admitted, could not have affected the verdict.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE A. DUPUY, Judge, presiding.

O'DONNELL, DILLON & TOOLLEN, and REYNOLDS & PURKHISER, for appellant.

PRINGLE, NORTHUP & TERWILLIGER, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment recovered by William O'Rourke in the superior court of Cook county against Elliott W. Sproul for personal injuries.

The appellant was the contractor for the mason work of a power house which the South Side Elevated Railroad Company was erecting in the city of Chicago. The appellee was a boiler maker in the employ of the Hamler Boiler Company, which was engaged in putting in a row of hoppers under the boiler room of the power house for the purpose of receiving the ashes from the furnaces. The power house consisted of an engine room and a boiler room on the main floor, with a basement under both rooms. The boiler room occupied the whole of the east part of the main floor and its floor was supported by I-beams. The west side of the floor was concreted to within a short distance of the row of hoppers, which extended north and south the length of the room, about fifteen or eighteen feet west of the east wall. The floor east of the row of hoppers was covered with rough two-inch planks laid close together. The hoppers were made of sheet iron, were about ten by

twelve feet in dimension at the top, were riveted to the I-beams under the main floor and reached to the floor of the basement. Appellee was working in one of these hoppers on the day of his injury. The top of the hopper was partly covered by four or five two-inch planks extending north and south, with spaces of twelve or fourteen inches between them. Lying diagonally across these planks, resting partly on the east part of the floor and partly on the two east planks and extending over the edge of the second plank, was an eight-foot railroad tie. Employees of the defendant were engaged in taking down a scaffold which stood against the inside of the east wall of the boiler room. It consisted of upright planks sixteen feet long, twelve inches wide and two inches thick, to which were nailed cross-pieces of the same kind of plank about eight or ten feet long, one end of each cross-piece being inserted in the wall. The last two uprights fell over west, away from the wall, and knocked the railroad tie into the hopper. Appellee was just leaving the hopper by an opening thirteen by eighteen inches at the bottom, putting his feet out first, when the tie fell on his hand, crushing it and causing a serious and permanent injury.

It is first insisted that the declaration is insufficient to sustain the judgment because no count thereof states a cause of action against the appellant. The declaration contained three counts, the first of which alleged that "the defendant was engaged in the construction of, and was assisting, as a contractor and otherwise, in the construction of, a certain building, to-wit, a power house for the South Side Elevated Railroad Company, and was employing certain servants then and there in said work, and had charge of and was using in said work, on the interior of the said building, certain servants then and there in said work, and had charge of and was using in said work, on the interior of said building, certain scaffolding made of planks and boards, and the plaintiff was then and there employed (but

not by the defendant) in and about a certain ash hopper therein, which fact was then and there well known to the defendant and his said servants, or might have been known to them by the exercise of ordinary care on their part; that it became and was the duty of the defendant, by his servants in that behalf, then and there to use ordinary and reasonable care in and about the work of the defendant, so as not to injure the plaintiff and so as to not expose him to unreasonable danger, yet the defendant, not regarding his duty in that behalf, by his said servants, then and there negligently knocked, pushed and pulled down a part of said scaffold and the planks and boards thereof, and suffered the same to fall with great force down to and upon a certain timber then and there, whereby said timber was then and there caused to fall with great force and violence upon and against the plaintiff, who was then and there and at all times herein mentioned in the exercise of due care for his own safety; in consequence thereof the plaintiff's right hand was then and there crushed and shattered by said timber, so that a part of said hand had to be and was amputated," etc. The second and third counts are substantially the same as the first, except that the negligence charged in the second is the failure to use any appliance in lowering the scaffold, to check its sudden and forcible fall, and the third alleges a failure to warn appellee before causing the scaffold to fall.

It is said that the declaration contains no allegation of any relation from which the law implies any special duty from the appellant to the appellee, no allegation of facts from which the law will imply a general duty by the appellant to use reasonable care to avoid injuring the appellee, and no allegation of any act done or omitted which amounted to a failure to use such reasonable care. Contrary to the rule where a declaration is demurred to, in the consideration of this question all intendments are to be taken in favor of the pleading. After verdict, on motion

in arrest of judgment, or on appeal, everything which by fair and reasonable intendment may be inferred from the general averments of the declaration will be presumed. It is averred that the appellant was engaged, as a contractor, in doing certain work in a building of which he was not the owner. It also appears that appellee was at the same time employed to do certain other work in the same building. The sufficiency of the allegation was not questioned by demurrer, and from it the implication arises, which is sufficient after verdict, that the employment of appellee at the time and place was by some one having authority so to employ him and that he was there in pursuance of such employment. One engaged in the construction of a building owes to another engaged in the same work and exercising due care for his own safety the duty of using reasonable care to avoid injuring him. (*Flanagan v. Wells Bros. Co.* 237 Ill. 82; *Langan v. Enos Fire Escape Co.* 233 id. 308.) The declaration averred appellant's knowledge of appellee's presence, and if by his servants he did his work in such a manner as to throw the timber down upon the appellee, it was a question to be determined from the evidence whether he was guilty of negligence. We regard each of the counts as sufficient after a verdict for the plaintiff.

It is insisted that it was error to refuse a peremptory instruction to find for the defendant because the appellee was guilty of contributory negligence. The appellee was not bound to anticipate negligence on the part of those engaged in taking down the scaffold. It was a question for the jury whether appellee had any reason to anticipate danger to himself in the absence of negligence on the part of appellant's servants. The question of assumed risk is not involved. The appellee was not the servant of appellant. No relation existed between them which would relieve the appellant from liability for any injury occasioned by his negligence. *Shoninger Co. v. Mann*, 219 Ill. 242.

Appellant's objections to the seventh, eighth and ninth instructions given at appellee's request are based upon the hypothesis that the various counts of the declaration failed to state a cause of action and that the instructions ignored the defense of assumption of risk. What has already been said disposes of these objections adversely to appellant's contention.

The tenth instruction is objected to because it assumed that the appellee was rightfully working on the premises and that the appellant owed him the duty to exercise care and caution for his safety. There could be no controversy, on the evidence, as to appellee's right to be where he was or as to appellant's duty to him, and the assumption in regard thereto was therefore not erroneous. The objection that the instruction is not limited by reference to the declaration is mistaken. The words "said failure or omission," in the latter part of the instruction, are limited by the previous reference to the declaration. The same objections are made to the sixteenth instruction. It is immaterial whether the reference to the declaration in that instruction is as broad as claimed or not, for the reason that the only negligence mentioned in that instruction is that specifically charged in the declaration.

The twenty-second instruction is criticised, but we do not regard it as objectionable.

Complaint is made of the action of the court in regard to the testimony of Peter Hesprich, one of the two men engaged in taking down the scaffold. After testifying as to the manner in which the scaffold was taken down and that ropes were used in lowering all the uprights except the last two, which were shaken loose and thrown down without ropes, he was asked if there was any other way of taking down the last two uprights; if he knew how they were always taken down in that kind of a scaffold; whether ropes were ever used, and what would be the result of using ropes. The appellee's complaint was of neg-

ligence in taking down the scaffold, and he introduced the testimony of a witness as to the customary method of doing such work. Several of appellant's witnesses testified on the same point. The appellant should have been permitted to examine the witness Hesprich also on this point, though some of the questions asked were open to objection. The error, however, we do not regard as prejudicial to the appellant, for the testimony of this witness, if received, could not have affected the verdict.

The judgment will be affirmed. *Judgment affirmed.*

LOUIS P. TEBOW, Appellee, vs. THE WIGGINS FERRY COMPANY *et al.* Appellants.

Opinion filed October 26, 1909.

1. EVIDENCE—if testimony is immaterial, alleged error in admitting it will not reverse. In a personal injury case, if, as claimed by the defendant, the question of what kind of work the plaintiff had been doing for his employer previous to the time of the accident is immaterial, alleged error in permitting the plaintiff to state what such previous employment was cannot be prejudicial and is not ground for reversal.

2. SAME—testimony cannot be complained of on appeal if abstract of record shows no objection thereto. Alleged error in permitting the plaintiff in a personal injury case to show that he was instructed by his foreman to unload a car of cinders in a certain manner, without requiring him to show that the defendants had any notice of the manner it was being unloaded or of the foreman's instructions, cannot be availed of an appeal, where the abstract of record shows no objection to such testimony.

3. SAME—what tends to show negligence in switching a partly unloaded car. Evidence tending to show that the defendant company coupled a switch engine onto a partly unloaded car of cinders which it had placed for unloading two days before, and that after moving the car some distance suddenly stopped it on a sharp curve, the outside rail of which was much higher than the lower one, and that the car, which had been unloaded on one side, only, tipped over as the unloaded cinders settled to the lower side, tends to show negligence in handling the car.

4. NEGLIGENCE—*when question of defendant's notice of condition of car is one of fact.* Whether the defendant company was charged with notice that a car of cinders was unloaded on one side, only, is a question of fact and not of law, where the defendant had placed it for unloading and two days later coupled onto it in its partly unloaded condition and was engaged in switching the car when it tipped over.

5. SAME—*fact that someone else is also negligent is no defense.* Even though it may have been negligence for the plaintiff's employer to instruct the plaintiff to unload cinders from one side of a car, only, and that such condition of the car was partly the cause of its turning over when the defendant was switching it, yet if the defendant's negligence in the manner of handling the car also contributed to its tipping over, the alleged negligence of plaintiff's employer does not excuse the liability of the defendant.

6. INSTRUCTIONS—*when instruction is not misleading.* An instruction advising the jury that if the defendant was guilty of the negligence charged in the declaration and such negligence caused the plaintiff's injuries, then the fact, if it was a fact, that the plaintiff's employer was also guilty of negligence in ordering him to unload the car in a certain way was no defense, is not misleading, as giving the jury to understand that the manner in which the car was unloaded, even if it caused it to tip over, was no defense, particularly where another instruction required the jury to find defendant not guilty if they found that the sudden stopping of the car on a sharp curve was not the cause of its tipping over.

7. APPEALS AND ERRORS—*Appellate Court's judgment of affirmance settles fact of negligence.* If there is any evidence sufficient to go to the jury upon the question of the defendant's negligence, the fact of such negligence is settled by the judgment of the Appellate Court upholding the conclusions of the jury and trial court.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. R. D. W. HOLDER, Judge, presiding.

KRAMER, KRAMER & CAMPBELL, for appellants:

There can be no recovery for injuries caused by the negligence of a defendant if the plaintiff's negligence contributed in any degree to the injury. *Railroad Co. v. El-*

dridge, 151 Ill. 549; *Railroad Co. v. Dewey*, 26 id. 255; 1 Shearman & Redfield on Negligence, sec. 93.

A person has no right to knowingly expose himself to the danger and then recover damages for injury which he might have avoided by the use of reasonable precaution. *Lovenguth v. Bloomington*, 71 Ill. 238; *Wilson v. Railroad Co.* 210 id. 603; *Railway Co. v. Cossar*, 203 id. 609.

The only duty owed by a railroad company to a trespasser or licensee is to refrain from wantonly or willfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril. *Railroad Co. v. Eicher*, 202 Ill. 556; *Thompson v. Railway Co.* 226 id. 542; *Casey v. Adams*, 234 id. 350.

To constitute actionable negligence these three elements must concur to make out a cause of action: (1) The existence of the duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. And the absence of any of these elements, either in the declaration or proof, renders the declaration insufficient to sustain a judgment for negligence, even after the verdict, or the proof to establish a cause of action involving actionable negligence. *McAndrews v. Railway Co.* 222 Ill. 232.

H. E. SCHAUMLEFFEL, and D. J. SULLIVAN, for appellee:

Whether or not the appellee was guilty of contributory negligence in remaining in the car was a question of fact for the jury. *Werk v. Steel Co.* 154 Ill. 432; *Railway Co. v. Johnson*, 135 id. 642.

Where one receives an actionable injury at the hands of two or more wrongdoers, all are severally liable to him for the full amount of damages occasioned by such injury; and the plaintiff has his election to sue all jointly, or he

may bring his separate action against each or any number of the wrongdoers. *Railway Co. v. Shacklet*, 105 Ill. 381.

Even if it should be held that the appellee's employer was also guilty of negligence in having appellee unload the car in the manner he did and that such negligence also contributed to his injury this would be no defense for appellants, provided they were guilty of the negligence charged in the declaration and that their negligence directly contributed to the injury. *Parmelee Co. v. Wheelock*, 224 Ill. 194.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On and before Monday, August 28, 1905, appellants operated switch yards in the city of East St. Louis. Near the switch yards and connected therewith was the plant of the Republic Iron and Steel Company, and the switching for that company was done by the appellants. One of the tracks of the Republic Iron and Steel Company was known as the "scale track" and another as the "Annie Rooney track." On Saturday, August 26, a coal car loaded with cinders was placed on the Annie Rooney track, where the Republic Iron and Steel Company was making a cinder platform. Some of the cinders were taken out and appellants moved the car from that place and set it back. The appellee, who was then sixteen years old, was working for the Republic Iron and Steel Company and had been working for it about six weeks, most of the time in picking up fish-plates or angle-irons. On Monday he and another boy and an old man were set to work unloading the car of cinders for the purpose of making the cinder platform. They were directed to shovel out the cinders from the side of the car next the platform, so that that side would be empty and the other side remain full. At about 10:45 in the morning all or nearly all of the cinders had been shoveled out of the side of the car next the cinder platform, leaving that side

practically empty and the other side full. Appellants were directed to move several cars which were back of the cinder car to the scale track, with which the Annie Rooney track was connected by a switch about two hundred yards long. The two boys were in the cinder car but the old man had left, and the switch engine backed several cars down against the car the boys were on and pushed it to the other cars and coupled to them. The couplings were made automatically, and the switch engine, with the cut of cars attached to it, started forward over the switch to the scale track. On the switch there was a sharp curve, and when the cinder car was at the most abrupt part of the curve, where the outside rail was much higher than the inside one and the loaded side of the car was on the inside, the engine stopped. The cinder car turned over on the inside of the curve and down the embankment and appellee was thrown out and received injuries, for which he brought suit, by his next friend, against the Republic Iron and Steel Company and the Wiggins Ferry Company. Afterward the suit was dismissed as to the Republic Iron and Steel Company, and the East St. Louis Connecting Railway Company, one of the appellants, was made a defendant.

There were several counts in the declaration repeating, substantially, the same charges that the defendants coupled to the cinder car without allowing plaintiff time to descend therefrom; that the car was negligently hauled around the sharp curve at a high rate of speed, and that the car was suddenly and violently stopped when it was on the sharp curve, causing it to turn over. The plea was the general issue, and on a trial the defendants moved the court to direct a verdict of not guilty. The court denied the motion and submitted the issues to the jury, which returned a verdict for \$3000. The defendants severally moved for a new trial, but the motions were overruled and judgment was entered on the verdict. The Appellate Court for the Fourth District affirmed the judgment. A reversal is asked in this

court on the grounds that the trial court erred in rulings on the admission of evidence, in refusing to direct a verdict and in instructing the jury.

The plaintiff, while testifying, was asked what kind of work he had been doing at the plant before the accident, and the court overruled an objection to the question. He answered that he had been picking up angles. If counsel are correct in their position that it was immaterial what kind of work the plaintiff had been engaged in, the answer that he had been picking up angle-irons could not have been prejudicial to the defense and the ruling would not be ground for a reversal.

Complaint is also made that the plaintiff was allowed to show that he was instructed by his foreman to unload the car in the manner in which it was unloaded, without showing that the defendants had any notice of the fact or the instruction, but the abstract shows no objection to that testimony.

It is insisted that the court ought to have directed a verdict of not guilty for the reason that there was no evidence to sustain the charges made in the declaration. There was no evidence that the defendants wrongfully coupled to the cinder car without allowing plaintiff time to descend therefrom. Just before the cars pushed by the switch engine struck the car on which the plaintiff was, one or more of the switch crew called to the boys to look out. The plaintiff made no effort to descend from the car and manifested no desire or intention to do so. He knew the car was to be switched somewhere about the plant and brought back, and he rode on the car from choice. There was no evidence tending to prove that he would have descended from the car if time had been given for the purpose, and his testimony did not indicate such a desire. The rate of speed at which the car was moved was estimated by different witnesses from three to six miles an hour, the highest estimate of five or six miles an hour coming from the plaintiff's

companion, with whom it was evidently a mere guess. But if there had been a high rate of speed it could not have caused the accident, because the higher the rate of speed the greater the centrifugal force, which would have carried the car against the outside rail, which was considerably higher than the inner one to guard against the effect of that force. A high rate of speed would have been effective to throw the car toward the outer side of the curve rather than the inside, and the rate of speed in going around the curve did not cause the accident. There was testimony, however, by the plaintiff and his companion, that the car was stopped suddenly on the curve and the car then settled back and tipped over on the inside of the curve. According to their testimony, when the car suddenly stopped, the weight which had been thrown against the outer rail suddenly settled back to the inside rail, which was much lower, and this tended to prove that the sudden stopping contributed to cause the car to turn over. On the motion to direct a verdict the court was required to take the testimony of the boys as true, but it is contended that the evidence conclusively shows that the car tipped over because the cinders had been removed from one side while the other side next the inside of the curve was still loaded. It is doubtless true that the condition of the load contributed to the tipping, and it is probable that the car would not have tipped over but for that condition. Counsel say that the defendants were not bound to know that the load was in that condition, and could properly handle the car on the assumption that it was loaded in the ordinary way. We do not think this court can declare, as a rule of law, that the defendants were not charged with knowledge of the condition of the load. The car was being unloaded by taking the cinders out of one side, and the defendants had handled it on Saturday and again coupled to it at the time of the accident. The court did not err in refusing to direct a verdict, and the conclusion of the jury and the trial court has

received the approval of the Appellate Court, so that the fact has been finally settled.

By instruction No. 19 given at the request of the plaintiff the jury were advised that if the defendants were guilty of the negligence charged in the declaration and such negligence caused plaintiff's injuries, the fact, if it was a fact, that the Republic Iron and Steel Company was also guilty of negligence in ordering plaintiff to unload the car in the manner it was unloaded was no defense. The doctrine that if the negligence of two contributes to an injury it is no defense for one to say that the other is also liable is not controverted, and it is conceded that if defendants knew the load was in the existing condition it would be no defense to show how it happened to get in that condition. The argument against the instruction is, that if the Republic Iron and Steel Company was negligent in ordering the car unloaded in the manner in which it was unloaded, and defendants had no notice of its condition and were guilty of no negligence in not having such knowledge, and the manner in which the car was unloaded was the cause of the tipping of the car, the jury would understand that the condition of the car was no defense. Otherwise stated, the objection is that the jury would understand from the instruction that although the manner in which the car was unloaded was the cause of its tipping over, the condition of the load was no defense. We do not see how the jury could have understood in that way the instruction, which required the jury to find the defendants guilty of the negligence charged in the declaration and that such negligence caused plaintiff's injuries. The evidence would not justify a conclusion that plaintiff's employer knew that the partially unloaded car would be moved around the curve, and there was no danger in unloading it by the method adopted at the place where it was. If, however, there was negligence in the manner of unloading the car and the defendants were also guilty of negligence in handling it they would be liable

for the consequences. By instruction No. 3 given at the request of the defendants the jury were told that if the car was not caused to be turned over by the violent and sudden stopping of it they should find the defendants not guilty, and taking these two instructions together there certainly could be no misunderstanding as to the law.

Complaint is also made that the court modified instruction No. 9 asked by the defendants, which, as offered, stated that if the cinders being nearly all on one side of the car was the cause of the car tipping over, plaintiff could not recover. The court modified it by making it read that if the cinders being nearly all on one side of the car was the sole cause of the car tipping over, plaintiff could not recover. If the condition of the load merely combined with negligence of the defendants and was not the sole cause of the car tipping over, such condition would not be a defense. Instruction No. 14 asked by the defendants merely repeated the law as stated in the ninth, and for that reason it was not error to refuse it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JOSEPH TRAFAS, Plaintiff in Error.

Opinion filed October 26, 1909.

APPEALS AND ERRORS—when a judgment must be affirmed for want of bill of exceptions. Absence of a bill of exceptions from the record in a criminal case requires an affirmance of the judgment below, where the only errors assigned which are argued in the brief of the plaintiff in error are that the trial court erred in the admission of evidence and that the verdict is contrary to the evidence, as neither of such assignments can be considered without the evidence, and the court's rulings thereon, being preserved by a bill of exceptions and incorporated in the record.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

W. G. ANDERSON, (GEORGE H. SUGRUE, of counsel,) for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and JUNE C. SMITH, (JOHN E. NORTHUP, of counsel,) for the People.

Per CURIAM: The plaintiff in error was convicted of the crime of robbery in the criminal court of Cook county and sentenced to the penitentiary at Joliet for an indeterminate period, and he has sued out a writ of error from this court to review said judgment of conviction.

At a former term of this court the bill of exceptions, upon the motion of the Attorney General, was stricken from the transcript of the record, and that transcript, as now made up, contains no bill of exceptions, and the only errors assigned upon the transcript of the record, which are argued in the brief of plaintiff in error filed in this court, are, first, the trial court erred in the admission of evidence; and second, the verdict is contrary to the evidence. Neither of these assignments of error can be considered without the evidence heard upon the trial and the rulings of the court thereon being preserved by bill of exceptions and incorporated in the transcript of the record filed in this court. There being no questions, therefore, presented to this court upon this record for review, the judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

GEORGE H. EHRICH, Conservator, Appellant, vs. EMMA BRUNSHWILER *et al.* Appellees.

Opinion filed October 26, 1909.

1. FIDUCIARY RELATIONS—as to administration of the estate, relation between administrator and widow is fiduciary. As to the matter of administering the estate, the relation between the administrator and the widow is that of trustee and *cestui que trust* and is fiduciary in character; but that relation does not extend to all their transactions and affairs.

2. SAME—whether fiduciary relation exists outside of legal relation is a question of fact. Whether a fiduciary relation exists between an administrator and the widow outside of the legal relation existing because of the administration is a question of fact, which depends not upon the technical relation of trustee and *cestui que trust*, but upon confidence reposed on one side and resulting influence and superiority on the other.

3. SAME—relief will be granted where confidence has been reposed and betrayed. Where confidence has been reposed by one party and resulting influence has been acquired by the other, equity will grant relief upon proper averments and proof showing that such confidence has been betrayed and such influence abused.

4. SAME—when deed cannot be canceled without proof of actual influence by the administrator. A deed made by the widow to her sister, who was the wife of the administrator appointed upon the widow's refusal to act as executor of her husband's will, should not be set aside because of the technical relation of trustee and *cestui que trust* existing between the grantor and the husband of the grantee, but only upon proper averments and proof showing actual influence by him in procuring the deed.

5. APPEALS AND ERRORS—chancellor's findings of fact from oral testimony will stand unless clearly wrong. Where all the evidence in a proceeding to cancel a deed for alleged want of mental capacity is heard in open court, including the testimony of the grantor herself, the finding of the chancellor as to the facts will not be disturbed, on appeal, unless clearly wrong.

6. The court reviews the evidence in this case, and holds that it fails to show the grantor in the deed sought to be set aside was without sufficient capacity to make the deed.

APPEAL from the Circuit Court of Kankakee county; the Hon. FRANK L. HOOPER, Judge, presiding.

J. BERT. MILLER, for appellant:

There is a well defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence resulting from fiduciary relations existing between the parties. Transactions between persons in a confidential relation are presumed, on the grounds of public policy, to be the result of undue influence. A confidential relation exists, and relief will be granted in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. *Thomas v. Whitney*, 186 Ill. 225.

This principle extends to every possible case in which a fiduciary relation exists in fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation, and the duties involved in it, need not be legal; it may be moral, social, domestic, or only personal. *Roby v. Colehour*, 135 Ill. 300.

In order to sustain the deed the burden was upon the Brunshwilers to show that the execution of the deed was the result of free deliberation on the part of the grantor and the deliberate exercise of her judgment, and not of imposition or wrong practiced by Brunshwiler for his wife's use. *Weston v. Teufel*, 213 Ill. 291; *Purdy v. Hall*, 134 id. 298.

Where a person enfeebled in mind is so placed as likely to be subjected to the influence of another and makes a voluntary disposition of property in favor of that person, the court requires proof of the fact that the donor understood the nature of the act and that it was not done through the influence of the donee. *Sands v. Sands*, 112 Ill. 225; *Dorsey v. Wolcott*, 173 id. 539.

Direct proof that undue influence was used is unnecessary where its exercise may be inferred. 13 Cyc. 595; *Sears v. Shafer*, 6 N. Y. 268.

Trustees, executors, administrators, guardians, and others sustaining fiduciary and confidential relations, can

not deal on their own account with the thing or persons falling within that trust or relationship, because in all these cases there is a trust and confidence reposed which would bring in conflict the interest of a trustee and the *cestui que trust*. *Thorp v. McCullum*, 1 Gilm. 614; *Miles v. Wheeler*, 43 Ill. 123; *Kruse v. Steffens*, 47 id. 112; *Ebelmesser v. Ebelmesser*, 99 id. 541; *Mason v. Odum*, 210 id. 471; *McCree v. Mier*, 64 id. 495; *Whitlock v. McClusky*, 91 id. 582.

The policy of the law which prohibits a person occupying a fiduciary relation from acquiring trust property, equally forbids the acquiring of such property by the wife of the trustee. This is the rule not so much for the reason that she may subsequently become entitled to some interest in his lands, as on account of the unity which exists between them in the marriage relation. *Lagger v. Building Ass.* 146 Ill. 283; *Tyler v. Sanborn*, 128 id. 136.

W. R. HUNTER, and D. P. CLEGHORN, for appellees:

Even in the case of a deed of bargain and sale, where the grantor is required by law to have a greater degree of mental capacity than in the case of making a will, if the grantor understands the nature of the business in which he is engaged and the effect of what he is doing, and can exercise his will with reference thereto, his act will be valid. *Martin v. Harsh*, 231 Ill. 384.

To justify a court of equity to set aside a deed for want of mental capacity it must appear that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction in which he was engaged. *Sears v. Vaughn*, 230 Ill. 572; *Beaty v. Hood*, 229 id. 562.

The burden is upon a complainant who seeks to set aside an executed deed for want of mental capacity or for the exercise of undue influence, to prove the allegations of his bill by a preponderance of the evidence. *Francis v. Wilkinson*, 147 Ill. 370.

There is no element of undue influence in this record, and the fact that appellees assisted the grantor in her affliction and looked after her business and her person when she had been deserted by all her other relatives does not constitute undue influence. *Bishop v. Hilliard*, 227 Ill. 382.

Where a cause is heard by a chancellor and the evidence is all or partly oral, it must appear that there is clear and palpable error before a reversal will be had. *Biggerstaff v. Biggerstaff*, 180 Ill. 407.

Mr. JUSTICE DUNN delivered the opinion of the court:

Henry Hertzberg died in September, 1907, having devised to his wife, Minnie Hertzberg, all his property, including the two-story building in which they resided and on the first floor of which Henry Hertzberg kept a saloon. On December 16, 1907, Mrs. Hertzberg conveyed these premises to her sister, Emma Brunshwiler, reserving a life estate to herself. In February, 1908, she filed a bill to set aside this conveyance. On March 5 a conservator was appointed for her, who was substituted as complainant. After a hearing upon the pleadings and evidence in open court the bill was dismissed for want of equity. The complainant has appealed.

The reasons alleged in the bill for the cancellation of the deed are, that Mrs. Hertzberg did not execute it, and that she was of unsound mind and incapable of executing it at the time it purports to have been executed. It is not, however, now claimed by appellant that she did not execute the deed.

The witnesses who testified for the complainant were, besides Minnie Hertzberg herself, three physicians. Dr. Smith was the physician attending her husband during his last illness and visited her four or five times after her husband's death, the last visit being September 19. He testified that she worried, fretted and sat up a good deal during her husband's sickness and completely collapsed when he

died, and that then, and for two weeks before, he did not think she was in any condition to transact any business. Dr. Gagnon was on the commission that examined Mrs. Hertzberg at the time the conservator was appointed and examined her by asking her questions. He testified that her mental condition at that time was bordering on feeble-minded, and that in his judgment she was not capable of transacting the ordinary business affairs of life knowingly. Dr. Badger testified that he attended Mrs. Hertzberg from about November 7 to the middle of December; that her mental condition was very poor, and that he did not consider her capable of making a deed during the time he saw her in December.

A. L. Granger, a lawyer who prepared a will for her after her husband's death, in her presence and under her direction, by which she devised all her property to Mrs. Brunshwiler; Joseph I. Granger, also a lawyer, who prepared the deed in controversy and as a notary public took the acknowledgment of it; Louie Beckman, who leased from Mrs. Hertzberg the first floor of the building in controversy; William Sanders, who witnessed the execution of the will written by A. L. Granger, and F. A. Schugmann, who saw Mrs. Hertzberg once or twice a week for two or three months after Mr. Hertzberg's death, all testified to the ability of Mrs. Hertzberg to understand business and to facts showing her capacity to transact business and her soundness of mind. The testimony of Dr. Smith and of Dr. Gagnon only had a very remote tendency to show mental incapacity on December 16, 1907. Mrs. Hertzberg was herself before the court and testified, all the evidence was heard in open court, and under such circumstances the finding of the chancellor will not be disturbed unless clearly wrong. We regard the finding here as in accordance with the weight of the evidence, without any regard to the testimony of Mr. and Mrs. Brunshwiler and their son and daughter, all of whom were witnesses on the hearing.

Mrs. Hertzberg was named in her husband's will as executrix but declined to act, and upon her petition Felix Brunshwiler, the husband of the grantee in the deed, was appointed administrator with the will annexed. Though no such claim is made in the bill, appellant's counsel has argued at some length that a fiduciary relation existed between Mrs. Hertzberg and the administrator, and that by reason thereof undue influence on his part would be presumed in procuring the conveyance to his wife. While it is true that as to the administration of the estate of Henry Hertzberg the relation of Felix Brunshwiler and Mrs. Hertzberg was that of trustee and *cestui que trust* and was therefore fiduciary in character, that relation did not extend to all the affairs of their lives. Whether any fiduciary relation existed outside the legal relation existing because of the administration was a question of fact to be determined from the evidence. Such relation depends, not upon the technical relation of trustee and *cestui que trust*, but upon the confidence reposed on one side and resulting influence and superiority on the other. Relief will always be granted where such confidence has been reposed and betrayed and such influence has been acquired and abused. (*Walker v. Shepard*, 210 Ill. 100; *Thomas v. Whitney*, 186 id. 225.) The evidence does not make such a case. There is no evidence of any actual influence in procuring the execution of the deed, which seems to have been the result of Mrs. Hertzberg's own desire, and there is neither allegation nor proof from which the court would be justified in decreeing a cancellation of the deed because of the existence of any fiduciary relation between the parties.

The decree of the circuit court will be affirmed.

Decree affirmed.

ANGELINE MATHIAS, Appellee, vs. THOMAS D. FULTON
et al.—(A. H. MILLER, Appellant.)

Opinion filed October 26, 1909.

1. REAL PROPERTY—*possession of grantee is notice though deed is not recorded.* Possession by a grantee under a deed conveying title to him is notice of his rights though he fails to record the deed, and a subsequent purchaser from the former owner takes title subject to the rights of such prior grantee.

2. SAME—*when possession by grantee of fee is notice.* Where a daughter purchases from a third person the fee of land in which her mother has a life estate, and the mother releases, by parol, her life estate to the daughter in consideration that the latter will move upon the premises and improve the same, the moving upon and improvement of the premises by the daughter constitute possession such as is notice of her rights to persons dealing with her vendor though her deed was not recorded.

APPEAL from the Circuit Court of Moultrie county; the
Hon. W. G. COCHRAN, Judge, presiding.

WALTER EDEN, and EDEN & MARTIN, for appellant:

An instrument first recorded takes priority, without regard to the time of its execution. *Simmons v. Stern*, 104 Ill. 454; *Phillips v. South Park Comrs.* 119 id. 626.

A person's possession of land as tenant of another affords no notice that he claims title to the premises. *Bradley v. Luce*, 99 Ill. 234.

A parol partition, though followed by exclusive possession in accordance with the agreement of partition, does not constitute color of title. *Sontag v. Bigelow*, 142 Ill. 143.

R. M. PEADRO, and M. A. MATTOX, for appellee:

Actual possession of premises under a deed is equivalent to recording as notice. *Brown v. Welch*, 18 Ill. 343.

The possession of a tenant is sufficient. *Morrison v. Morrison*, 140 Ill. 560; *Mallett v. Kaehler*, 141 id. 70; *Whitaker v. Miller*, 83 id. 381.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Moultrie county by Angeline Mathias against Thomas D. Fulton, Joseph A. Miller and A. H. Miller to cancel a deed from Fulton to Joseph A. Miller and a deed from Joseph A. Miller to A. H. Miller as a cloud upon the title of Angeline Mathias to an eighteen-acre tract of land situated in said county. Answers and replications were filed and the cause was referred to the master in chancery to take the evidence and report his conclusions as to the law and the facts. The evidence was taken and the master filed a report, in which he recommended that the relief prayed for in the bill be granted. Objections were filed with the master and renewed as exceptions in the circuit court and overruled, and a decree was entered setting aside and canceling the deeds from Fulton to Joseph A. Miller and from Joseph A. Miller to A. H. Miller, and an appeal has been prosecuted by A. H. Miller to this court to reverse said decree.

It appears from the pleadings, evidence and master's report that Thomas D. Fulton, on the sixth day of December, 1895, was the owner of said premises in fee, subject to a life estate therein in Cassander E. Berry, the mother of Angeline Mathias. On that day Fulton sold and conveyed said premises to Angeline Mathias for the sum of \$540, which was paid by Angeline Mathias to Fulton, and Cassander E. Berry released to her daughter, by parol, her life estate in said premises in consideration that her daughter would move upon the said premises and improve the same; that shortly thereafter Angeline Mathias and husband erected a dwelling house, barn and fences upon said premises, and occupied the said premises, by themselves or their tenants, until the time this bill was filed; that the deed for said premises from Fulton to Angeline Mathias upon its execution was delivered and remained in her possession until the date of the trial but was not recorded until some twelve years after its delivery; that on the 18th

day of December, 1907, Thomas D. Fulton conveyed said premises by a quit-claim deed to Joseph A. Miller, and a few days later Joseph A. Miller conveyed said premises by a quit-claim deed to appellant, A. H. Miller, which deeds were recorded and are the deeds sought to be canceled.

The law in this State is well settled that where a party receives a deed and takes possession of the land conveyed thereby his possession is notice to subsequent purchasers of his rights although he fails to record his deed, and if a subsequent purchaser deals with the former owner of the land he does so at his peril, and will take title subject to the rights of the prior purchaser who has taken possession under his deed. (*Brown v. Welch*, 18 Ill. 343; *Whitaker v. Miller*, 83 id. 381; *Morrison v. Morrison*, 140 id. 560; *Mallett v. Kaehler*, 141 id. 70.) We think, therefore, the trial court properly held that the conveyances from Fulton to Joseph A. Miller and from Joseph A. Miller to A. H. Miller were void as against Angeline Mathias.

Finding no reversible error in this record the decree of the circuit court will be affirmed.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellees, vs.
JOHN RUBRIGHT *et al.* Appellants.

Opinion filed October 26, 1909.

1. *SCIRE FACIAS*—*bail—purpose of scire facias on forfeited recognizance.* The purpose of a *scire facias* upon a forfeited recognizance is to give the parties an opportunity to show cause why judgment should not become absolute; but it is wholly immaterial whether the cognizor is guilty or innocent of the criminal charge against him, and that question cannot be inquired into.

2. *SAME*—*fact that act upon which criminal charge is based is unconstitutional is no defense.* A person under recognizance to appear and answer a charge against him cannot disregard his obligation to appear, and afterwards, in a *scire facias* proceeding upon the forfeited recognizance, attempt to justify his default upon the ground that the law upon which the criminal charge was based is unconstitutional.

3. APPEALS AND ERRORS—*when appeal in scire facias proceeding should go to Appellate Court.* A *scire facias* proceeding upon a forfeited recognizance is a civil suit to enforce a contract liability, and an appeal therein lies to the Appellate Court in the first instance, in the absence of any special ground for a direct appeal to the Supreme Court.

4. SAME—*when alleged unconstitutionality of statute does not give Supreme Court jurisdiction.* Since the unconstitutionality of the statute upon which a criminal charge is based cannot be urged in defense of a *scire facias* proceeding upon the forfeited recognizance of the person charged with such crime, the fact that the constitutionality of the act is attacked in such proceeding does not give the Supreme Court jurisdiction of a direct appeal from the judgment therein.

APPEAL from the County Court of Whiteside county;
the Hon. HENRY C. WARD, Judge, presiding.

C. L. & C. E. SHELDON, for appellants.

W. H. STEAD, Attorney General, JOEL C. FITCH, and
HARRY H. WAITE, for the People.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is a proceeding by *scire facias* upon a forfeited recognizance. On September 14, 1908, the State's attorney of Whiteside county filed an information in the county court charging John Rubright, William Holmes and John Kirby with dynamiting fish in Elkhorn creek, in the said county, in violation of the act of June 5, 1907. The county judge ordered the information filed and fixed the bail of each of the defendants at \$200. A warrant was issued, upon which appellant Rubright was arrested, and he entered into a recognizance before the sheriff, with Thomas McCue as surety. The condition of the recognizance required Rubright to appear at the September term, 1908, and from term to term and from day to day of each term, and to abide the final order of the court and not depart the court without leave. On October 26, being one of the days

of the September term and the day upon which the cause was set for trial, Rubright failed to appear and a judgment forfeiting his recognizance was duly entered against him and his surety. A *scire facias* was ordered returnable on the 14th day of December, to which time the cause, as to Rubright, was continued. On November 16 Rubright appeared and entered a motion, supported by affidavits of himself and McCue, to set aside the default. On December 15 Rubright was tried on the information by a jury and acquitted. A motion to set aside and vacate the default was then overruled. Rubright and McCue were then given time to plead to the *scire facias* and filed six special pleas. The first was a plea of *nul tiel* record; second, that the county court did not have jurisdiction; third, *non est factum*; fourth, that the sheriff did not have authority to take the bond; fifth, *nil debet*; sixth, that the act of June 5, 1907, under which the information was filed, was unconstitutional. The court sustained a demurrer to the third, fourth and sixth pleas and a replication was filed to the first, third and fifth pleas. The issues thus formed were submitted to the jury and a verdict returned for \$200, upon which the court rendered judgment after overruling a motion for a new trial. The present appeal is prosecuted by the defendants below to reverse this judgment.

At the threshold of this case we are met with the question as to the jurisdiction of this court to consider this appeal. A *scire facias* on a forfeited recognizance is a civil suit for the recovery of money due upon a contract. (*Conner v. People*, 20 Ill. 382; *Wood v. People*, 16 id. 171; *Lawrence v. People*, 17 id. 172; *Peacock v. People*, 83 id. 331.) Being a civil suit to enforce a contract liability, it is clear that the appeal should have gone to the Appellate Court since the amount involved is only \$200, unless this court has jurisdiction because the constitutionality of a statute is involved. The question of jurisdiction is not argued in the briefs, but we infer that the jurisdiction of

this court is assumed by appellants and conceded by appellees for this reason.

Our statute provides that when any person who is accused of any criminal offense shall give bail for his appearance and does not appear in accordance with the terms of the recognizance the court shall declare such recognizance forfeited, and the clerk of the court shall thereupon issue a *scire facias* against such person and his sureties, returnable on the first day of the next term of court, "to show cause why judgment should not be rendered against such person and his sureties for the amount of the recognizance." The statute also provides that "before judgment the court may, in its discretion, set aside such forfeiture, upon the accused being brought or coming into open court and showing to the court, by affidavit, that he was unable to appear in court according to the terms of the recognizance, by reason of sickness or some other cause which shall satisfy the court that the accused had not been guilty of any *laches* or negligence." (Hurd's Stat. 1908, chap. 38, par. 310.) Paragraph 311 of the above statute provides that the action shall not be barred nor defeated nor shall judgment be arrested by reason of neglect or omission to note or record the default of any principal or surety at the time when it happens, nor by reason of a defect in the form of the recognizance, if it sufficiently appears from the tenor thereof at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to record and take such recognizance.

The purpose of a *scire facias* upon a forfeited recognizance is to give the parties an opportunity to show cause why judgment should not become absolute. (*People v. Watkins*, 19 Ill. 117.) The issues which may be tried in this proceeding are not the same as are involved in the criminal proceeding out of which it originated. It is wholly immaterial in a proceeding by a *scire facias* whether the defendant is guilty or innocent of the criminal charge against

him, and that question cannot be inquired into. The very purpose of the recognizance is to secure the attendance of the person charged, in order that all questions touching his guilt or innocence may be determined. A person under recognizance to appear and answer a charge against him cannot disregard his obligations to appear and afterwards excuse himself on the ground that his appearance was unnecessary because he was not guilty of the charge. Neither can the cognizor make default and afterwards seek to justify the same on the ground that the law under which he was charged is unconstitutional. Such defense is not available to him in a proceeding by *scire facias* upon his forfeited recognizance. We are therefore of the opinion that the constitutionality of the statute under which this information was filed cannot be raised or decided in this case. It follows that this appeal is improperly brought to this court. The cause will therefore be transferred to the Appellate Court for the Second District.

Cause transferred.

SALOMEJA KOSTURSKA, Appellee, vs. PETER BARTKIEWICZ,
Appellant.

Opinion filed October 26, 1909.

1. DEEDS—*certificate of acknowledgment cannot be impeached by unsupported testimony of the grantor.* A statutory certificate of acknowledgment to a deed cannot be overcome by the unsupported testimony of the grantor.

2. SAME—*proof of fraud must be clear to overcome certificate of acknowledgment.* While, as between the parties to a deed, the certificate of acknowledgment may be impeached for fraud, collusion or imposition it cannot be otherwise attacked, and the evidence upon the issue of fraud, collusion or imposition must be so complete and reliable as to fully satisfy the court that the certificate is fraudulent and untrue.

3. SAME—*what evidence does not overcome certificate of acknowledgment.* A statutory certificate of acknowledgment to a

deed made by a grantor who could neither read nor understand English is not overcome by her testimony that she remembered nothing about signing a deed or what was said at the time because she was sick but that her mind was clear and she did not lose it, where the notary testified that the grantor was sick but that the deed was explained to her, at her request, in language she understood, and that she said "All right," and signed the deed.

4. *UNDUE INFLUENCE*—*a charge of fraud and circumvention is inconsistent with claim of undue influence.* A charge of fraud and imposition in the execution of a deed is inconsistent with a claim that the deed was voluntarily executed by the grantor through the exercise of undue influence; and a finding in the decree that the deed was not knowingly executed is also inconsistent with a claim of undue influence.

5. *FIDUCIARY RELATIONS*—*when fiduciary relation does not exist.* A fiduciary relation does not arise from the mere fact of the relationship existing between the grantor and her daughter, who was the mother of the grantees.

APPEAL from the Superior Court of Cook county; the Hon. A. C. BARNES, Judge, presiding.

EDWARD R. LITZINGER, for appellant:

In the absence of any allegation or proof of fraud on the part of the officer taking the acknowledgment of a deed, or of any fraudulent collusion between him and any interested party, the certificate, as to the statements made in it, must prevail over the unsupported evidence of the grantor in the deed. *Oliphant v. Liversidge*, 142 Ill. 160; *Monroe v. Poorman*, 62 id. 524; *Dock Co. v. Russell*, 68 id. 430; *Fitzgerald v. Fitzgerald*, 100 id. 385; *Watson v. Watson*, 118 id. 56.

When the genuineness of a signature to an instrument is established it affords *prima facie* evidence that the contents of the instrument were known to the subscriber and that it is his act, and hence the burden of proof is upon those who assert the contrary, to overcome this *prima facie* evidence. *Life Ins. Co. v. Gray*, 80 Ill. 28.

Where the court, in its decree, refers to the evidence upon which the facts are found, and it fails to support the

finding, the decree will be reversed. *Kennedy v. Merriam*, 70 Ill. 228; *Preston v. Hodgen*, 50 id. 56.

In the case of a gift from a child to a parent undue influence may be inferred from the relation itself, but never when the gift is from the parent to the child. *Oliphant v. Liversidge*, 142 Ill. 160.

BEACH & BEACH, and OTTO H. BEUTLER, for appellee:

A fiduciary relation existed between the complainant and her daughter. Transactions between parties sustaining a fiduciary relation to each other, as father and son, are *prima facie* voidable upon motion of the one reposing the confidence, upon grounds of public policy; and the burden of proof, such fiduciary relation having been established, is upon the one seeking a benefit to show fairness, good faith and the absence of undue influence. *Morgan v. Owens*, 228 Ill. 598; *Michael v. Marshall*, 201 id. 70; *Weston v. Teufel*, 213 id. 291; *Leonard v. Burtle*, 226 id. 422.

A deed by a party to one bearing a fiduciary relation to him will, upon his motion, be set aside unless the grantee shall affirmatively show the absence of undue influence, and establish the fact that the grantor acted upon the confidence and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties or was beneficial to the grantor. This rule applies not only to cases where there exists a formal and technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, principal and agent, etc., but to all cases in which confidence is reposed by one party in another. *Thomas v. Whitney*, 186 Ill. 225; *McParland v. Larkin*, 155 id. 84.

In determining the question of undue influence a broad distinction is to be taken between a disposition by the donor which takes from him his whole estate and leaves him

helpless, and one which provides for him during his life and disposes of his property in a rational mode at his death. *Oliphant v. Liversidge*, 142 Ill. 160.

Mr. JUSTICE DUNN delivered the opinion of the court :

This appeal is from a decree of the superior court of Cook county setting aside a deed from appellee to appellant. The reason alleged for setting aside the deed is that it was never signed or acknowledged by the grantor or by her authority. It is further alleged that if the deed does bear the genuine signature of the appellee, such signature was obtained by fraud, circumvention and over-reaching of appellee, without her knowledge or understanding of the contents of the instrument or that she was signing a deed and without any intention on her part to sign or acknowledge a deed.

The appellee, Salomeja Kosturska, was born and reared in Austria, and neither speaks nor understands the English language. She came to this country in 1901, and on July 8 arrived at the home of her daughter, Walentyna Olsztynska, in Chicago, where she has ever since resided. The day after her arrival the premises on which the daughter resided, and which she owned, were conveyed to the appellee by her daughter and the latter's husband for an expressed consideration of \$2400. The appellee and her daughter and her daughter's family continued to reside together upon the premises until the daughter and her husband died, in 1907, since which time appellee and appellant, who is her grandson, have occupied the premises together. On June 7, 1905, the appellee executed to the appellant and to his brother, Victor Bartkiewicz, who were her daughter's sons, a deed conveying said premises to them as joint tenants and not as tenants in common. It is this deed which the bill seeks to set aside. Victor Bartkiewicz has died since the deed was made.

There is a disagreement as to the reason of the making of the deed to appellee by her daughter. It is claimed by the appellant that the property was conveyed by his mother to his grandmother in trust for himself and his brother, while the appellee testified that she brought from Austria with her 1200 gulden, alleged by the bill to be equivalent to \$576, which she gave to her daughter, and her daughter told her she was willing the house to her. Whatever may have been the motive for the conveyance, appellee acquired by it an indefeasible title to the premises, of which she could be deprived only by her own act. The chancellor found that the deed sought to be canceled bore the genuine signature of the appellee, but that she placed such signature to the deed without knowledge or understanding that she was signing a deed. Attached to the deed is the certificate of a notary public in the statutory form, showing the acknowledgment of the grantor in the usual way. There is no evidence tending to show that the appellee did not understand that she was signing a deed except her own testimony. She testified that she remembered nothing about signing a deed or what was said at the time, because she was sick, but that her mind was clear and she did not lose it. Wilkoscheski, the notary public who certified to the acknowledgment of the deed, testified that the appellee was sick and in bed at the time; that she asked for an explanation of the deed, and it was explained to her in the Polish language both by himself and by her daughter, and that she said "All right," and then signed the deed.

The certificate of the acknowledgment of a deed in the manner provided by law cannot be overcome by the unsupported testimony of the grantor. While, as between the parties to the deed, such acknowledgment may be impeached for fraud, collusion or imposition, it cannot be otherwise attacked; and the evidence upon such issue of fraud, collusion or imposition must, "by its completeness and reliable

character, fully and clearly satisfy the court that the certificate is untrue and fraudulent." (*Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Marston v. Brittenham*, 76 id. 611; *Watson v. Watson*, 118 id. 56; *Calumet and Chicago Canal and Dock Co. v. Russell*, 68 id. 426; *Monroe v. Poorman*, 62 id. 523; *Lickmon v. Harding*, 65 id. 505; *Graham v. Anderson*, 42 id. 514; *Oliphant v. Liversidge*, 142 id. 160.) In the cases cited are fully set forth the reasons of public policy which make the rules stated imperative. Under them the certificate of acknowledgment was not successfully impeached.

Counsel for appellee seek to sustain the decree upon the ground that a fiduciary relation existed between the appellee and her daughter, and that by reason thereof undue influence would be presumed on the part of the daughter in procuring the deed to be made to appellant. Relief was neither asked in the bill nor granted by the decree on this ground. The charge in the bill was that the deed was not executed by appellee or was obtained by fraud and circumvention. The charge was inconsistent with the claim that the deed was voluntarily executed through the exercise of undue influence. The decree found that the deed was not knowingly executed, which finding is also inconsistent with the charge of undue influence. The evidence on the part of the appellant is that appellee held the title in trust and by the conveyance was merely carrying out the original object of the parties, while appellee's testimony indicates a purchase of the property by her or a conveyance as security. No fiduciary relation arises out of the kinship of the parties alone, and the evidence does not show such relation.

The decree is reversed and the cause remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

MARY BRENNEN, Appellee, vs. THE CHICAGO AND CARTERVILLE COAL COMPANY, Appellant.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*Appellate Court's approval of verdict settles the facts.* If there is evidence sufficient to go to the jury upon a question of fact, the finding of the jury on that fact, when approved by the trial court and the Appellate Court, settles such fact, and no question of the credibility of the witnesses, or whether the evidence is sufficient to sustain the verdict or whether the weight of the evidence is against the verdict, can be raised in the Supreme Court.

2. NEGLIGENCE—*place where body was found after explosion is not conclusive that deceased was there before.* The fact that the place where the body of a miner was found, after an explosion, was some two hundred and sixty feet beyond the room where he was required to work is not conclusive that he was at that place at the time of the explosion, where there is some evidence that the rebound of the explosion might have blown the body there from the room where deceased was required to work.

3. MINES—*section 18 of the Mines and Miners act is for protection of all the employees.* The provisions of section 18 of the Mines and Miners act relating to the daily examination and inspection of the mines and the daily record to be kept of such inspection are for the protection of all who are employed in the mines, including engineers, firemen, pumpmen, shot-firers, drivers and other workmen and employees.

4. SAME—a mine manager may also act as mine examiner. A person who is authorized to act as mine manager in Illinois may also act as mine examiner; but the refusal of an instruction to that effect in a personal injury case is not erroneous, where the defendant's mine manager does not claim to have made any examination or report of the condition of the mine and there is no evidence that he made any such examination.

5. INSTRUCTIONS—*substantial repetitions of instructions may be refused.* It is not reversible error to refuse instructions the substance of which is included in other instructions given to the jury.

6. SAME—*party cannot complain of error in instruction for opponent if his own instruction has same error.* A party will not be permitted to complain, on appeal, of an error in his opponent's instruction where his own instruction contains the same error.

7. EVIDENCE—in an action for death, proof that deceased supported family is proper. In an action for negligent killing, proof of the resources of the widow or next of kin, or their financial condition at the time of or since the death of the deceased, is not admissible, but it is not error to allow questions concerning the earnings of the deceased and whether the wife and children were supported by him; and this is true whether the action is under section 33 of the Mines act or under section 2 of the Injuries act. (*Jones & Adams Co. v. George*, 227 Ill. 64, and *McCarthy v. Spring Valley Coal Co.* 232 id. 473, distinguished.)

8. TRIAL—matter of cross-examination rests largely with trial court. The latitude to be allowed in the matter of cross-examination rests largely in the discretion of the trial court, and a cause will not be reversed for alleged error in rulings on cross-examination unless it is clear that such discretion has been abused.

CARTWRIGHT and DUNN, JJ., dissenting.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Williamson county; the Hon. W. W. DUNCAN, Judge, presiding.

DENISON & SPILLER, (GEORGE C. MASTIN, of counsel,) for appellant:

A servant must be in the discharge of his duties, or in a place where the duties of his employment require him to be, before he can recover damages of his master for injuries received. 1 *Shearman & Redfield on Negligence*, sec. 190; 4 *Thompson on Negligence*, secs. 3748, 3750; 2 *Labatt on Master and Servant*, 1845; 13 *Ency. of Pl. & Pr.* 893; *Lenk v. Coal Co.* 80 Mo. App. 374; *Morrison v. Fibre Co.* 70 N. H. 406; *Wright v. Rawson*, 52 Iowa, 329; *Kennedy v. Chase*, 119 Cal. 637; *Severy v. Nickerson*, 120 Mass. 306; *Ellsworth v. Metheny*, 104 Fed. Rep. 119.

Where the plaintiff and defendant both have willfully violated the Mining statute, and the injury would not have occurred but for the willful violation of the statute by the plaintiff, the parties are *in pari delicto* and there can be no recovery of damages. 1 *Thompson on Negligence*, sec. 83;

Shaffner v. Pinchback, 133 Ill. 410; *Boddie v. Brewing Co.* 204 id. 353; *Railroad Co. v. Godfrey*, 71 id. 500.

The violation of the statute by the defendant must be the proximate cause of the injury. Where there intervenes between the violation of the statute by the defendant and the injury an independent illegal act on the part of the plaintiff, without which the injury would not have occurred, such independent illegal act of the plaintiff itself becomes the proximate cause of the injury, and the original wrong of the defendant would be the remote cause, for which damages cannot be recovered. 1 *Thompson on Negligence*, sec. 49; 2 *Labatt on Master and Servant*, secs. 806-809; 1 *Shearman & Redfield on Negligence*, secs. 26, 27; 21 *Am. & Eng. Ency. of Law*, 493.

Where speculation and conjecture have to be resorted to for the purpose of determining whether the injury resulted from the defendant's negligent act or from some other cause, damages cannot be allowed for such injury. *Railway Co. v. Birney*, 71 Ill. 391; 8 *Am. & Eng. Ency. of Law*, 614; *Epperson v. Postal Tel. Co.* 155 Mo. 382; *Sorenson v. Pulp Co.* 56 Wis. 338; *Searles v. Railway Co.* 101 N. Y. 661; *Priest v. Nichols*, 116 Mass. 401.

Where an instruction substantially directs the verdict, regardless of defenses which there was evidence fairly tending to prove, the error in such instruction is not obviated by giving conflicting instructions on that question. *Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 246; *Pardridge v. Cutler*, 168 id. 513; *Milling Co. v. Spehr*, 145 id. 335; *Metal Co. v. Weber*, 196 id. 526.

It was error to allow the appellee to state that the deceased had other family than appellee and that he supported them. *Jones & Adams Co. v. George*, 227 Ill. 64; *McCarthy v. Coal Co.* 232 id. 473.

Where a loss of life has been occasioned by reason of a willful violation of the Mining statute, the right of action given to the widow is to recover the direct damages she has

sustained by reason of such loss of life. It is in no sense a right to recover damages "to her means of support." Hurd's Stat. chap. 33, sec. 93.

Either party in a case is entitled to an instruction based upon his theory of the case if there is any evidence to support that theory; and where the trial court has denied this right the Appellate Court should reverse and remand. *Insurance Co. v. Anapaw*, 45 Ill. 86; *Eames v. Rend*, 105 id. 506; *Railway Co. v. Foster*, 175 id. 396.

HARTWELL & WHITE, and R. T. COOK, for appellee:

No conduct of the deceased short of seeking the very injury of which appellee complains could have the effect of barring a recovery when the defendant's willful conduct has brought about such injury. *Coal Co. v. Strine*, 217 Ill. 516; *Coal Co. v. Beaver*, 192 id. 233; *Coal Co. v. Stroff*, 200 id. 483.

The jury have the right to take into consideration the natural instincts which prompt one to the preservation of life and the avoidance of injury and consequent pain and death. *Railroad Co. v. Beaver*, 199 Ill. 34.

Contributory negligence by the plaintiff in going into a place in a mine with notice of the dangerous conditions existing is no defense to an action based upon a willful violation of the statute, if an injury results therefrom. *Coal Co. v. Strine*, 217 Ill. 516; *Coal Co. v. Stroff*, 200 id. 483.

When a mine owner willfully violates the provisions of the statute in the operation of his mine the doctrine of contributory negligence does not apply. *Coal Co. v. Beaver*, 192 Ill. 338; *Coal Co. v. Strine*, 217 id. 526; *Coal Co. v. Abbott*, 181 id. 495.

The title of the Mining act shows conclusively that the object of the statute is to protect the health and safety of all persons employed in the mine. Hurd's Stat. chap. 93; *Davis v. Collieries Co.* 232 Ill. 284; *Coal Co. v. Greig*, 226 id. 511.

A conscious failure to observe and comply with the provisions of the Mining act, even though no evil intent induces the failure, is a willful violation. *Mining Co. v. Carnduff*, 221 Ill. 354.

Under section 18 of the Mines act the mine owner's duty does not cease with making an examination as provided by the statute, but the mine examiner should make a report, in a book kept for that purpose, of the condition of the mine as he found it, before the men are permitted to enter the mine to work. *Coal Co. v. Royce*, 184 Ill. 415; *Coal Co. v. Rowatt*, 196 id. 156; *Coal Co. v. Martin*, 221 id. 460.

. Mr. JUSTICE CARTER delivered the opinion of the court:

This was a suit brought by the appellee under the Mines and Miners act, against appellant, for damages sustained by her through the death of her husband, Peter Brennen, who was killed October 26, 1906, by an explosion in appellant's mine in Williamson county, Illinois. The case was finally tried on four counts of the declaration, each charging a violation of said mining act. Appellant pleaded the general issue, and the trial resulted in a verdict of guilty and assessment of damages in appellee's favor for \$4000. An appeal was taken to the Appellate Court, where the judgment of the trial court was affirmed, and this appeal follows.

At the time of his death, and for some time previous, Peter Brennen was employed as a pumpman in appellant's mine. The mine contained a main entry leading south from the bottom of the shaft about two hundred and fifty feet to a point where two entries, called the first and second east entries, left the main south entry and ran parallel, a short distance apart, about two thousand feet east. The rooms mined were known by number, several having been worked out between the main entry and the east end or face of

the first and second east entries. For the purpose of supplying a current of air to the miners, whenever the coal was dug out to a distance of about sixty feet or more a new cross-cut would be made between these two entries and the last old one closed up or "bratticed," as it is called, so that the current of air would be kept to the face of the entry,—that is, the part furthest from the main shaft. The artificial air current was maintained by forcing the air by way of the main south entry into the second east entry, thence along that entry to the furthest open cross-cut, thence through the cross-cut in the partition wall between the entries to the first east entry and back through this last named entry to the main entry, and thence to the air shaft. The last cross-cut furthest east and near the face of said east entries was about opposite room 53, the first east entry extending east some fifty-nine feet and the second east entry extending east about forty-nine feet beyond this cross-cut. Eight or nine months previous to Brennen's death there had been a "squeeze" in said east entries, causing a break, which permitted the water to come in and also left the roof in bad condition. A pump was put in room 39 of the first east entry and a pipe extended from that room east to room 47, where there was a "sump" or depression in which water collected and which it was Brennen's duty to pump out. This required him to visit room 47 daily. After the squeeze occurred work had been abandoned in that part of the mine until a short time before Brennen's death, when other employees of appellant commenced clearing up these entries for the purpose of resuming work. These employees took out the brattice or stopping at a former cross-cut between the two entries near room 41 of the first east entry. As a result the current of air which formerly went east to near the face of the entry made a short circuit through this cross-cut and thence back out through the first entry. The portions of the two entries east of the last named cross-cut thus being largely deprived of their usual

ventilation, partially filled with bad air and dangerous gases. Some two hundred and twenty-five feet east from the open cross-cut opposite said room 41 was room 47, in which was the depression to which the pipe was laid, as heretofore stated, and between the said cross-cut at said room 41 and room 47 it was necessary for Brennen to travel daily in the line of his duty. Brennen was reported missing on the evening of October 26, and upon a search being instituted his body, and that of an Italian by the name of Spesia, were found, both in the first east entry near its face, Brennen's body being about thirty or forty feet west of the last cross-cut and the Italian's body some feet further east. During the search it was discovered that there had been an explosion in the east entries. From its effect it was apparently mainly in the first east entry and started near its face. Its evidences were shown as far west in said entry as room 39,—that is, a little distance west of the open cross-cut opposite room 41. The proof shows that the explosion was a violent one in that portion of the mine. A loaded car, weighing more than a ton, was thrown off the track somewhere between the two open cross-cuts, the evidence being somewhat indefinite as to the exact point. A two-inch water pipe was broken at room 47, and brattices in the closed cross-cuts between the two entries were broken down at several places and timbers and other debris thrown across the roadway.

Appellant insists that there is no evidence in the record to support the verdict, and it presented a peremptory instruction at the close of appellee's evidence, and again at the close of all the evidence, raising this question.

The superintendent of the mine, who was manager at the time of Brennen's death, testified that he told Brennen not to go further east in said entry than room 47. Other witnesses stated that Brennen had told them it was dangerous to go beyond that point. Counsel for appellant argue that as Brennen's body was found some two hundred and

sixty feet east of room 47 he must have gone beyond the point required by his duties, against the orders of the mine manager. Room 47 was between the two open cross-cuts. The testimony tends to show that where two cross-cuts are open, there will still continue a slight circulation of air near the cross-cut farthest from the shaft, and that if gas were collecting there, such circulation might increase the force of an explosion by supplying oxygen. The evidence tends to show, and it is practically conceded in appellant's brief, that there was no inspection of this part of the mine by the mine manager, and no marks near the first cross-cut connecting the first and second entries, nor any mark in any portion of said first east entry near said room 47, to indicate there might be danger from the accumulation of gas. Neither was there any report to the mine manager of the finding of an accumulation of gas or other dangerous condition in said entry, nor any record of such in the book in which the mine manager made his daily report. It is contended that if Brennen went into that portion of the mine east of room 47 before the explosion occurred, where his duties did not require him to go, he was violating the mining statute and that appellee could not recover; that the mine operator owes the men at work in the mine no duty to inspect, ventilate and otherwise keep reasonably safe any portion of a mine except that part where the duties of the men require them to work and to pass in going to and returning from their work. The case was tried and the instructions given to the jury on this theory. The conclusion that we have reached on this record renders it unnecessary for us to decide as to whether this is the proper construction of this law.

Appellant earnestly insists that the fact that Brennen's body was found so far east of room 47 conclusively shows that at the time of the explosion he was in a part of the mine to which his duties did not require him to go. The testimony of some of the witnesses tended to show that the

force of an explosion is first against any current of air that might be coming towards the center of the explosion, and then there will be a rebound, as it were, caused by the air rushing in towards the center of the explosion, and that sometimes the force of the rebound is greater than the first shock, and that the force of this rebound may have carried Brennen's body from near room 47 to the place where it was found. The testimony in behalf of appellant tended to contradict this theory. One of the witnesses stated that it would be most difficult to tell just what the effect of such an explosion would be. We think the evidence was sufficient to submit to the jury the question whether Brennen was east of room 47 at the time of the explosion, and when the finding of the jury on that fact has been approved by the trial and Appellate Courts, "no question of fact as to whether one witness' story is more reasonable or credible than another, whether the evidence is sufficient to support the verdict, or whether the weight or preponderance of the evidence is against the verdict of the jury, can be raised here." *Reiter v. Standard Scale Co.* 237 Ill. 374, and cases cited on p. 380.

On the facts as shown the trial court did not err in refusing to take the case from the jury.

Appellant further contends that the court erred in refusing instruction No. 2, which, in substance, stated that as Peter Brennen was a pumpman, section 18 of the mining statute, requiring a daily inspection of the mine to be made and a report of its condition to be kept in a book for that purpose, did not apply to him, as a pumpman is not a miner, as that term is used in said section, the argument being that the term "miners," as there used, designates "those employees who dig and remove the coal from the various working places," and that this does not include engineers, firemen, pumpmen, shot-firers, etc. In *Davis v. Illinois Collieries Co.* 232 Ill. 284, a shot-firer was held to come within the provisions of section 20 of this act, and in

McCarthy v. Spring Valley Coal Co. 232 Ill. 473, a mule driver was held to be within the provisions of the act. We think the provisions of section 18 as to the daily examination and inspection of the mine and the daily record to be kept of such inspection are for the safety and protection of all who are employed in the mine, including engineers, firemen, pumpmen, shot-firers, drivers and other workmen and employees. This instruction was therefore rightly refused.

Instruction 3 asked by appellant stated, in effect, that one who is authorized to act as mine manager in this State can also act as mine examiner. There was no error in refusing the instruction, though it stated the law correctly, for the reason that the mine manager in question did not claim to have made an examination or a report of the condition of the mine, and there is no evidence in the record that he did make such examination. The fourth instruction was properly refused for the same reason.

The court, in refusing the fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth instructions offered by appellant did not commit reversible error, as the substance of all was included in other instructions given to the jury. Many minor suggestions are made as to faults in these instructions, which we do not consider it necessary to discuss in detail. "This court has never approved the practice of burdening the trial court with so many instructions" as were offered in this case. (*Chicago, Peoria and St. Louis Railroad Co. v. Woolridge*, 174 Ill. 330.) Those that were given substantially covered the law of the case as contended for by appellant.

Appellant further contends that some of appellee's given instructions were erroneous because they based her right of recovery upon damages to her means of support instead of damages for direct injury by reason of such loss of life, and that in determining such injury it was improper for the jury to take into consideration the effect of Peter Bren-

nen's death upon her means of support. Section 33 of said Mines and Miners act provides that a right of action shall accrue to the widow of a person killed, for damages for the injuries sustained by reason of such loss of life, and it is argued by counsel for appellant that the recovery here must be based on the same class of proof as to the injury as a recovery under section 2 of the Injuries act. (Hurd's Stat. 1908, p. 1185.) Conceding that the character of the proof as to the damages must be the same under both of these acts, we do not think the proof offered on behalf of the appellee was improper or that the instructions given were erroneous. The evidence objected to simply showed that the deceased supported his family with his earnings. This court held in *Pennsylvania Co. v. Keane*, 143 Ill. 172, that it was competent to show that the wife, children or next of kin were dependent upon the deceased for support before and at the time of his death, stating (p. 175) that "this view is in consonance with the statute that gives the action, and which provides that such damages shall be given as are a fair and just compensation for the pecuniary injury resulting from the death to the wife and next of kin of the deceased person. It cannot well be said that proof that the wife or next of kin of the deceased were, at and before the time of his decease, dependent upon him for support, or that he was her or their sole support, is wholly immaterial and irrelevant to any point at issue in the case." This doctrine has been quoted with approval in *Swift & Co. v. Foster*, 163 Ill. 50, *St. Louis, Peoria and Northern Railway Co. v. Dorsey*, 189 id. 251, and *Pittsburg, Cincinnati, Chicago and St. Louis Railway Co. v. Kinnare*, 203 id. 388. These authorities are not in conflict with *Chicago and Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, *Chicago, Burlington and Quincy Railroad Co. v. Johnson*, 103 id. 512, *Chicago and Alton Railroad Co. v. May*, 108 id. 288, and *Chicago, Peoria and St. Louis Railroad Co. v. Woolridge*, *supra*, as contended by counsel for appellant.

These last authorities lay down the rule that it is not competent to show the pecuniary circumstances of the widow, family or next of kin at the time of or since the decease of the intestate, and are reviewed and distinguished by this court in *St. Louis, Peoria and Northern Railway Co. v. Dorsey, supra*. While it is erroneous to admit evidence of the resources of the widow or next of kin or their financial condition, it is not error to allow questions concerning the earnings of the deceased and whether the wife and children were supported by him. Counsel, in this connection, insist that *Jones & Adams Co. v. George*, 227 Ill. 64, and *McCarthy v. Spring Valley Coal Co. supra*, are recent cases in which this court lays down a rule supporting their contention on this point. In both these last cases the trial court permitted the person injured, and who was suing in his own name and for himself to recover damages for the injury, to show that he had a wife and children depending upon him for support. This was held error. These cases are clearly distinguishable, on principle, from the one here under discussion.

Appellant further insists that the court erred in giving appellee's instructions 3, 5 and 8, arguing that each of these instructions directed the jury to return a verdict in favor of appellee, regardless of appellant's defense that the deceased met his death by reason of the willful disregard of the orders of appellant's mine manager and assistant manager not to go beyond said room 47. We do not think the jury could fairly construe these instructions as ignoring the defense urged by appellant on the trial below. Moreover, if it be conceded that they did ignore such defense, the third instruction given for appellant must also be held to have ignored this defense. It is a familiar rule that a party has no right to complain of an error in an instruction when a like error appears in an instruction given at his own request. *Chicago and Alton Railroad Co. v. Harrington*, 192 Ill. 9; *Spring Valley Coal Co. v. Robizas*, 207 id. 226.

It is further insisted that the trial court committed error in its rulings in the cross-examination of certain witnesses of the appellant. The latitude to be allowed in the cross-examination of witnesses rests largely in the discretion of the trial court, and a cause will not be reversed for alleged improper rulings in that respect unless such discretion has been clearly abused. We cannot say, on this record, that there was any reversible error committed by the trial court as to such cross-examination. While the record is not entirely free from errors, we do not think any of them are of such a nature as to cause a reversal of this cause.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

CARTWRIGHT and DUNN, JJ., dissenting

THE SANITARY DISTRICT OF CHICAGO, Appellant, *vs.* THE METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY *et al.* Appellees.

Opinion filed October 26, 1909.

1. APPEALS AND ERRORS—*when a freehold is involved.* A proceeding for a mandatory injunction to compel the removal, from premises claimed in fee by the complainant, of a bridge abutment which the defendant claims the right to maintain by virtue of a perpetual easement in the land, involves a freehold, and a direct appeal lies to the Supreme Court.

2. RES JUDICATA—*one not a party to condemnation suit is not bound by judgment.* Where a sanitary district, after beginning suit to condemn a strip of land, acquires a portion of such strip by purchase from the city with knowledge that a part of the purchased land is in possession of an elevated railroad company which is not made a party to the condemnation suit, the condemnation judgment, finding the title to the purchased land to be in the petitioner, is not binding upon the railroad company and does not deprive it of any rights in the land it may have acquired from the petitioner's grantor, the city.

3. MUNICIPAL CORPORATIONS—*when consent of a city to use of its land must be presumed.* Where the ordinance granting to an elevated railroad company the right to construct its railroad along a specified route and to build a new bridge across a river between certain streets provides that the work shall be done upon such plans and in such manner as shall be approved by the commissioners of public works, the building of an abutment for the bridge upon land acquired by the city with a view to excavating it to widen the river must be presumed to have been done with the consent of the city.

4. SAME—*affirmative act by city is not essential to create an estoppel.* While the right of the public in lands held in trust for it by a city cannot be lost by mere non-user, yet it is not essential that there be some affirmative act by the city upon which to base an estoppel, but the estoppel may arise out of long acquiescence, coupled with such conduct and acts by the city as amount to a ratification.

5. SAME—*when doctrine of equitable estoppel applies.* Where a city, with full knowledge of the facts and with the approval of its commissioner of public works, permits an elevated railroad company to expend a substantial sum of money in building a bridge abutment upon the city's land and makes no objection for many years to the railroad company's use of the completed bridge, the doctrine of equitable estoppel applies, and neither the city nor its grantee with notice can compel the railroad company to remove the abutment and surrender possession of the land.

6. PRACTICE—*correct practice where appeal should have been taken to Appellate Court.* If an appeal is taken to the Supreme Court which should have been taken to the Appellate Court; the Supreme Court, under the present statute, will not dismiss the appeal on motion but will transfer the cause to the Appellate Court.

APPEAL from the Circuit Court of Cook county; the Hon. JULIAN W. MACK, Judge, presiding.

The appellant, the Sanitary District of Chicago, filed its original bill of complaint in this cause in the circuit court of Cook county on the 7th day of August, 1908. The Metropolitan West Side Elevated Railway Company, the Aurora, Elgin and Chicago Railroad Company and the city of Chicago were made defendants. The two last named defendants filed general demurrers to the bill and the Met-

ropolitan Railway Company filed a general and special demurrer. On February 26, 1909, appellant filed an amendment to its bill of complaint, and it was ordered by the court that the demurrers of the several defendants to the original bill stand to the amended bill. The demurrers of all the defendants were sustained by the court, and the appellant electing to stand by its bill of complaint as amended, said bill was dismissed by the court, and the appellant has prosecuted this appeal.

It is alleged in the amended bill that appellant is a municipal corporation organized and existing under the act of May 29, 1889, creating sanitary districts; that by said act it is granted power to provide for carrying off the drainage of said sanitary district by establishing and maintaining one or more channels, drains, ditches and outlets for that purpose; that it could acquire, by purchase, condemnation or otherwise, any and all real estate and personal property and right of way privilege, either within or without its corporate limits, that may be required for its corporate purposes, and that it is authorized to enter upon, widen, deepen and improve any navigable or other water-way, canal or lake. It is further alleged that in order to carry out the purposes for which it was organized and make effective the main channel by it constructed, it was necessary for it to widen and deepen the Chicago river, and also for the purpose of complying with the statute of the State of Illinois and obtaining as a minimum flow through its channel three hundred thousand cubic feet of water per minute; that the board of trustees of the complainant on May 20, 1903, passed an ordinance, by the terms of which the said board laid out and established a right of way for the deepening and widening of the said Chicago river between the south line of Madison street and the north line of VanBuren street, in the city of Chicago, and in order to make said improvements it was necessary to excavate certain premises hereafter described. It is further alleged that

complainant constructed a channel from Robey street, in the city of Chicago, to the city of Joliet, Illinois; that the Secretary of War gave permission to complainant to connect its said channel with the west fork of the south branch of the Chicago river, and that pursuant to said permission said connection was made, and since the 17th of January, 1900, the waters of the said Chicago river have flowed into said main channel and from thence into the DesPlaines and Illinois rivers.

It is further alleged that on the 9th of December, 1885, the Pittsburg, Fort Wayne and Chicago Railway Company, being the owner of certain land in Chicago, Cook county, Illinois, abutting upon the west side of the south branch of the Chicago river, by an instrument of that date duly executed, granted, bargained and sold to the city of Chicago a certain part of said premises described in said instrument; that said instrument was duly recorded in the recorder's office of Cook county, Illinois, on March 11, 1886. This instrument is set out in full in the bill, and recites, in substance, that whereas the first party, the Pittsburg, Fort Wayne and Chicago Railway Company, a corporation of the State of Illinois, is possessed of certain real estate in the city of Chicago, county of Cook and State of Illinois, abutting upon the west side of the south branch of the Chicago river; and whereas the second party, the city of Chicago, desires to secure from the first party a certain portion of said lands for the purpose of straightening the south branch of the Chicago river between Adams street and VanBuren street; and whereas, also, second party is about to construct a swing bridge over the said south branch of the Chicago river at Adams street where the same crosses said south branch, and desires to obtain from first party the right to construct, operate, maintain and swing said bridge over certain land possessed by said first party abutting upon said south branch upon the west side thereof and lying on either side of Adams street where the same crosses the said

south branch; therefore the first party, in consideration of the payments and covenants stipulated to be paid and performed by the second party, grants, bargains and sells to the second party certain land abutting on the west side of the south branch of the Chicago river lying on either side of Jackson street, the portion of said land on the south side of said Jackson street thus conveyed being 8311 square feet, more or less, and the portion on the north side of said Jackson street being 1742 square feet, more or less. Said conveyance is made for the purpose and object that the land may be excavated, and that the south branch of the Chicago river between Adams and VanBuren streets may be straightened to this extent. The first party retains the right to land vessels at the dock to be constructed by said first party after said excavation shall have been made, for the purpose of loading and unloading, but such use shall not interfere with the operation of said Adams street bridge or with the rights of second party in and to Jackson street, or with the free use of the river for the purposes of navigation. The first party grants to second party the right to erect and forever maintain, operate and swing a bridge at Adams street, on the west side of the south branch of the Chicago river where Adams street crosses said river. It is recited that as the land mentioned had been leased from the Pennsylvania Railroad Company, the consent, in writing, of this company to the agreement should be obtained as a condition precedent to the validity of the agreement. This consent was obtained and is set out and made a part of the agreement. The second party agrees, in consideration of the grants aforesaid, to pay to the said Pennsylvania Railroad Company, or to such person or corporation as may be designated, in writing, by such company, the interest on the sum of \$30,000, at the rate of four per cent per annum, provided the second party may at any time pay the whole of said principal sum of \$30,000, or any part thereof. Upon the payment of said entire prin-

cipal sum all further payments by said second party shall cease and all rights granted by this agreement shall vest in said second party in perpetuity, but the riparian rights or easements retained by first party shall not be impaired. The right given to party of the second part to make the entire payment of the \$30,000 shall be exercised within twenty years from the date of the agreement. The instrument is dated December 9, 1885.

It is further alleged in the bill that another contract was made between the city of Chicago and the Pittsburg, Fort Wayne and Chicago Railway Company on June 28, 1889, which was duly recorded, and provided that said city should have the right to construct and operate a full-arm instead of a half-arm bridge at Adams street, and that in accordance with said contracts said city of Chicago did construct swing bridges at Adams street and at Jackson street, which were and are connected with Canal street by viaducts, which extend over and across certain railroad tracks and buildings.

It is further alleged that on the 7th of April, 1892, the city council of the city of Chicago passed an ordinance, which was duly accepted by the Metropolitan West Side Elevated Railroad Company, granting to such company permission and authority to construct, maintain and operate an elevated railroad and branches. A copy of the ordinance is made a part of the bill and is set out in full. By section 1 of the ordinance permission and authority are granted to the Metropolitan West Side Elevated Railroad Company to construct, maintain and operate, for a period of fifty years from and after the passage of the ordinance, an elevated railroad, with branches, etc., along and upon certain routes in the city of Chicago, which are, in part, as follows: First, for the main line of said railroad, commencing on or near to the east line of Fifth avenue, in the city of Chicago, at some point between the south line of Jackson street on the north and the north line of West Congress street (as it exists at the west line of Halsted

street if produced, east to Fifth avenue,) on the south, and running thence between said Jackson street on the north and the said line of Congress street so produced on the south, over, along, upon and across such lots, lands and property as the company now owns or hereafter may acquire, by lease, purchase, condemnation or otherwise, to the south branch of the Chicago river; thence across said river by means of a bridge, as hereinafter provided. Fourth, the said company may cross the Chicago river, as provided in section 1, either by means of a new bridge hereby authorized to be constructed by it, upon such plans and in such manner as shall be approved by the commissioner of public works, or, at its option, by means of the existing bridge now erected at VanBuren street at the said place of crossing, and for that purpose the said company may, at its own expense, re-build and enlarge the said existing bridge upon such plan and in such manner as shall be approved by the mayor and commissioner of public works, but the same, as so re-built and enlarged, shall not, nor shall such new bridge hereby authorized, be so constructed as to unnecessarily obstruct navigation or drainage.

The bill further alleges that after the passage of the ordinance aforesaid, the Metropolitan West Side Elevated Railroad Company entered into an agreement with the Pennsylvania Railroad Company and the Pittsburg, Fort Wayne and Chicago Railway Company, dated April 16, 1894, in and by which agreement said last mentioned companies purported and attempted to grant and convey to the Metropolitan West Side Elevated Railroad Company the right to construct and maintain its elevated railroad structure over and upon the premises described in said contract of December 9, 1885, but that said attempted grant and conveyance as to said premises were subject to the rights of the city of Chicago, and to the extent that said conveyance was in conflict with the rights of the said city the same was null and void and of no effect.

It is further alleged that on the 9th day of February, 1898, the complainant and the Pennsylvania Company (operating the Pittsburg, Fort Wayne and Chicago Railway Company) entered into an agreement, whereby there was granted by the Pennsylvania Company to the complainant the right to construct a by-pass over and across a portion of said premises. Article 2 of this agreement provides that the sanitary district shall construct the by-pass at its own expense and shall pay any damage resulting from the by-pass to the railway company; that the sanitary district shall cover the by-pass and pay an annual rental of \$3000. By the fifth section it is provided that whenever the sanitary district shall determine that the use and maintenance of said by-pass is not necessary, then it shall have the right to terminate the contract upon giving six months' notice of its election to do so and that all liability shall then cease, and it is alleged that this notice was given and accepted on October 23, 1905, and that thereafter all rights of the respective parties to said contract ceased and determined.

The bill alleges that on the 21st day of April, 1899, the complainant entered into an agreement with said Metropolitan West Side Elevated Railroad Company, whereby the complainant agreed to make certain alterations in the water tunnel of said company. This agreement recites, among other things, that the sanitary district is engaged in improving the Chicago river to supply the amount of water required by law; that the river cannot be deepened on account of the tunnel of the railway company; that the company requires large amounts of water in its production of electricity; that this water is supplied by means of a tunnel which extends across the right of way and yards of the Pennsylvania railroad to the river at a point immediately north of the Metropolitan bridge abutment; that the sanitary district proposes to construct the by-pass west of the abutment of the Metropolitan bridge under its agreement with the railroad company of February 9, 1898, and that

the construction of the by-pass will destroy one hundred and four feet of the tunnel; that the district desires to protect the company in the full beneficial use of said tunnel and desires to construct a new intake on the west side of the by-pass, so that the company may have the same use of said tunnel that it would have had had said by-pass not been constructed. The company consents that the district may construct a by-pass in accordance with said agreement of February 9, 1898, and the sanitary district agrees to maintain the water supply of the tunnel during the construction of the by-pass and to pay damages for each hour the supply is cut off; to keep the by-pass clean, to the end that the company may have the same supply of water that it would have if the tunnel and intake had remained in the original position, and if it shall discontinue or be deprived of the use of said by-pass for any reason it shall at once reconstruct that part of said tunnel above described, and in default of so doing for a period of sixty days shall pay the sum of \$50 per day to said company or its successors for each one thousand horse-power then employed by said company or its successors. The district agrees not to damage the bridge or railroad of the company during the construction of the by-pass. It is alleged that on May 26, 1899, an agreement was entered into between the Pennsylvania Company, as party of the first part, the Metropolitan West Side Elevated Railroad Company, as party of the second part, and complainant, as party of the third part, relating to the taking up and reconstruction by the complainant of a certain intake and tunnel belonging to the said Metropolitan Railroad Company, as provided in the agreement between complainant and said company dated April 21, 1899, and that in accordance with both of said agreements the complainant constructed said by-pass, and that it also, at its own expense, removed and reconstructed the intake and water tunnel above mentioned.

The bill alleges that prior to October 1, 1903, the complainant had purchased numerous tracts of land adjacent to said south branch and caused the same to be excavated for the purpose of widening and deepening said stream, and was desirous of securing the right to excavate the premises conveyed to the city of Chicago by the said Pittsburg, Fort Wayne and Chicago Railway Company by said instrument of December 9, 1885, and in order to secure said right represented to the mayor of the city of Chicago that it would pay to said city the sum due from said city to said railway company under the terms of said instrument, and that thereupon, on October 5, 1903, the mayor submitted to the city council of said city a message, wherein he set forth the terms of the agreement of December 9, 1885, between the city and the railway company, and stated that the city had paid the rental therein provided for up to the 30th day of June, 1898; that the project which the city of Chicago undertook of widening and straightening the river had been taken up by the trustees of the Sanitary District of Chicago; that said trustees had offered to furnish the city the amount of money due for the payment of the purchase price and interest which had accrued, said money to be used by the city for the payment to the railway company of the amounts due under said instrument. Pursuant to the message of the mayor the city council of Chicago, on October 5, 1903, adopted a resolution, which recites the provisions of the contract of December 9, 1885, above referred to and set forth; that whereas the Sanitary District of Chicago is engaged in widening and deepening the south branch of the Chicago river, and the said land so purchased by the said city of Chicago by the said contract of December 9, 1885, being necessary for the use of the said sanitary district in so widening and improving the south branch of the Chicago river; and whereas the sanitary district offers to pay to the city of Chicago the amount of money necessary to complete and perfect the title of the city of

Chicago in said real estate so purchased by it, being the sum of \$30,000 purchase money and \$7000 rental, therefore it is resolved that the comptroller of the said city of Chicago is authorized to receive from said sanitary district the sum of \$37,000 for the purposes aforesaid, and upon receipt of said money the comptroller is ordered to pay it over as directed by the terms of said contract, and if for any reason a larger sum is required, the comptroller is authorized to receive and pay it out on the same conditions.

It is further alleged that on the 6th day of October, 1903, for the purpose of acquiring the right to excavate said property, the trustees of the sanitary district adopted a resolution, which is set forth in the bill, and which also recites the terms and provisions of the contract of December 9, 1885, between the city and the railway company, and in substance the same facts as contained in the ordinance of October 5, 1903, adopted by the city of Chicago. The resolution then authorizes and directs the president and clerk of the sanitary district to deposit with the comptroller of the city of Chicago the sum of \$40,000, or such part thereof as is necessary to be used by said comptroller for the purposes aforesaid, and in order to facilitate the work of the district in acquiring the property aforesaid for the purposes of widening the south branch of the Chicago river. It is alleged that said sum of \$40,000 was so paid to the city of Chicago pursuant to said resolution and that the sum of \$3000 was returned by it to the district, as it was found that the sum of \$37,000 was the amount due under the contract; and that on May 20, 1903, the trustees of the sanitary district passed an ordinance laying out and establishing its right of way for deepening and widening the south branch of the Chicago river between the south line of Madison street and the north line of VanBuren street, in said city, and that the premises described in the contract of December 9, 1885, were included in said ordinance.

The bill further alleges that on May 26, 1903, the complainant filed its petition for condemnation in the circuit

court of Cook county, Illinois, making the Pittsburg, Fort Wayne and Chicago Railway Company, the Pennsylvania Company and the city of Chicago defendants; that the real estate described in said contract of December 9, 1885, was included in said petition; that thereafter, and preliminary to the empaneling of the jury in said condemnation proceedings, a trial was had upon the question of title and testimony was heard and evidence offered, and thereupon the court, on October 21, 1903, entered a judgment, finding, among other things, that the lands described in said instrument of December 9, 1885, belonged to the complainant, to be used by it for the uses and purposes described in said petition; that after the entry of said order of October 21, 1903, a jury was empaneled in said cause and a trial had to determine the just compensation to be awarded for certain premises described in said petition but not described or included in said contract of December 9, 1885, and that a verdict and judgment were rendered in said cause awarding to certain respondents the sum of \$1,389,940; that the complainant perfected an appeal from said judgment to the Supreme Court of the State of Illinois, and that court affirmed the judgment of the circuit court. *Sanitary District of Chicago v. Pittsburg, Ft. Wayne and Chicago Railway Co.* 216 Ill. 575.

It is further alleged in the bill that by reason of the foregoing facts and the judgments of the circuit court of Cook county and the Supreme Court of Illinois complainant became and is the owner of said premises described in said contract of December 9, 1885, and is entitled to exercise all rights in and to said premises acquired by said city of Chicago under the agreement of December 9, 1885; that the rights of complainant are superior to the alleged rights of the Metropolitan West Side Elevated Railway Company or of the other defendants to the bill; that on June 1, 1894, the Metropolitan West Side Elevated Railroad Company wrongfully and unlawfully entered on said

land in said instrument of December 9, 1885, described, excavated a large hole in said land and placed therein a certain abutment or foundation for its bridge extending over and across said south branch, and completed said bridge on or about May 1, 1895; that said company never had any title to or easement in the premises, or any part thereof, or any grant, license or permission from complainant or the city of Chicago. It is alleged that all the right, title and interest of said Metropolitan West Side Elevated Railroad Company in and to the said abutment and bridge and other property of said company were duly transferred and assigned to the Metropolitan West Side Elevated Railway Company, and that said last named company now owns said property and operates said railway, and has unlawfully and wrongfully, from time to time, entered upon said premises in said instrument of December 9, 1885, described, laid and maintained wires and railroad tracks and repaired the said abutment and bridge, and that said company never had any right or easement in said premises.

The bill alleges that that part of the south branch of the Chicago river situated immediately easterly of the property described in the agreement of December 9, 1885, is extremely narrow; that the by-pass above mentioned was constructed for the purpose of causing a part of the waters of said river to flow through the same; that the waters of said river have flowed, and still do flow, through said by-pass; that it would cost approximately \$2000 to extend the said tunnel of the Metropolitan West Side Elevated Railway Company described in the agreement of April 21, 1889, from its present terminus at the westerly wall of the said by-pass to the cut-off line hereinafter mentioned, and that when so extended the waters of the river will continue to flow into said tunnel, and the complainant avers that it is ready and willing, and offers and agrees, to extend said tunnel in any form or manner the court shall direct or decree.

It is further alleged that the south branch of the Chicago river varies in width from one hundred and forty to two hundred feet, excepting that part adjacent to the premises described in the agreement of December 9, 1885; that the plans of complainant for widening said river require a uniform width of two hundred feet, excepting between bridge abutments; that most of the property required for widening said river to said width has been secured, and numerous new bridges have been constructed across said south branch by complainant at a cost of over \$7,000,000; that in order to widen said south branch on the east side thereof opposite the premises in question it would be necessary to remove many valuable brick buildings and widen the river from Adams street almost to VanBuren street, and that the same would cost in excess of \$1,500,000, while the removal of the westerly half of the said bridge, including the abutment, would cost not to exceed \$20,000. It is alleged that the waters of said south branch formerly flowed in a northerly direction into the main branch of the Chicago river; that since the main channel of the sanitary district has been opened said waters flow in a southerly direction into said channel; that if the property acquired by complainant, as aforesaid, is excavated prior to the removal of said west abutment, said waters striking said abutment will be diverted in an easterly direction, will create a cross-current immediately north of said bridge, and render navigation in said river at this point difficult and dangerous for vessels of large capacity.

It is further alleged that said abutment is constructed of solid concrete; that upon said concrete are massive iron pillars that support the superstructure of said bridge, and that said structure and abutment are permanent in character; that said railroad extends across and upon said bridge; that said defendants the Metropolitan West Side Elevated Railway Company and the Aurora, Elgin and Chicago Railroad Company have been and are guilty of numerous tres-

passes upon the said bridge and upon the property of the complainant by running electric and other cars over the same every day, and that a multiplicity of actions would be necessary to recover for such trespasses; that said property and west abutment are so situated that they interfere with the flow of the waters of the river and with vessels navigating said river and cause loss, delay and damage to the same, and unless said abutment is removed complainant will suffer great and continuous injury and damage; that in order to remove the part of said abutment and bridge situated upon said premises acquired by complainant, as aforesaid, it would be necessary to remove other parts of said abutment and bridge situated on other and different premises; that it is impossible to remove the part of said abutment situated upon the property of complainant without damaging other parts of the bridge and abutment and railroad owned by the said Metropolitan Railway Company, and if the complainant should perform such acts it would be guilty of trespass and liable in damages therefor. It is further alleged that the complainant has caused a written demand to be served upon said Metropolitan West Side Elevated Railway Company requesting said company to remove said abutment from said premises and to cease maintaining the same; that said company has failed and refused to comply with said demand and threatens to continue said abutment upon said premises for the purpose of acquiring an easement in said premises, and also threatens to annoy and vex complainant with criminal indictments and prosecutions if it shall remove or attempt to remove said abutment; that if the said Metropolitan Railway Company is permitted to continue its said abutment on said premises complainant will suffer great and irreparable injury therefrom and be prevented from exercising and enjoying the rights acquired by it, as aforesaid.

The prayer of the bill is that the court may enter a decree directing the Metropolitan West Side Elevated Rail-

way Company to immediately and forthwith remove said abutment from the premises hereinabove described, and that said company may be enjoined from continuing or maintaining said abutment upon said premises, and that all of said defendants be enjoined from using or appropriating said land, or any part thereof, in any manner which will conflict with the rights acquired by complainant as above set forth.

JOHN C. WILLIAMS, and WILLIAM BEEBE, for appellant.

W. W. GURLEY, A. L. GARDNER, H. M. CARTER, and HOPKINS, PEFFERS & HOPKINS, (FRANK J. LOESCH, of counsel,) for appellees.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

Appellees the Metropolitan West Side Elevated Railway Company and the Aurora, Elgin and Chicago Railroad Company have filed a motion to dismiss the appeal in this case. The reasons assigned in support of the motion are, that there is no question involved which gives this court jurisdiction and that the appeal should have been taken to the Appellate Court. If this were true it would not authorize a dismissal of the appeal but would require a transfer of the case to the Appellate Court. Appellant claims to be the owner in fee of land which is in the possession of the Metropolitan West Side Elevated Railway Company and in which it claims a perpetual easement. The bill seeks to deprive it of the right claimed. A freehold is therefore involved, and the appeal was properly brought to this court. *Espenscheid v. Bauer*, 235 Ill. 172; *Village of Riverside v. Watson*, 157 id. 669; *City of DeKalb v. Luney*, 193 id. 185.

While counsel for appellant have in their brief and argument discussed a wide range of questions and cited a

multitude of authorities, we are of opinion the decision in this case depends upon whether the city of Chicago was estopped from interfering with the Metropolitan company's right to maintain its bridge upon a portion of the land in question. The appellant concedes that it occupies the same legal position with reference to the property in question that the city of Chicago occupied before granting it to appellant, and that if the doctrine of estoppel could be applied against the city it may also be applied against appellant, its grantee.

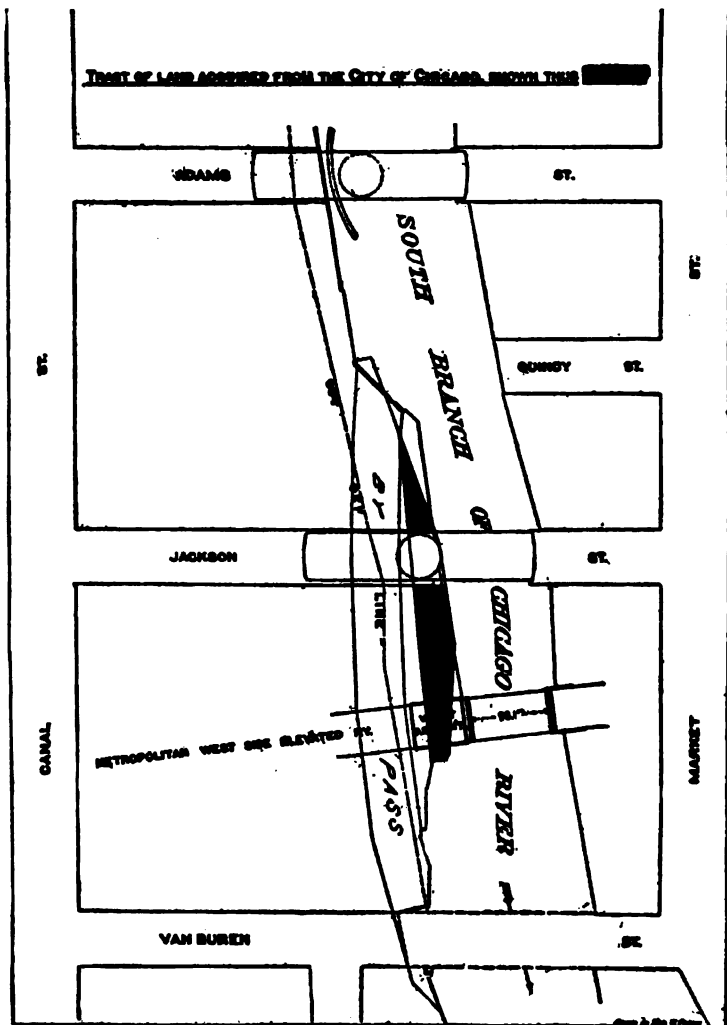
It must be conceded for the purpose of this decision that the fee simple title to the land in dispute is, as claimed by appellant, in the sanitary district. Its title, the bill alleges, was acquired from the city of Chicago in October, 1903, and the city of Chicago acquired its title from the Pittsburg, Fort Wayne and Chicago Railway Company in December, 1885. The Metropolitan company claims an easement in a portion of the land granted by the city to appellant as a support for a part of its bridge across the Chicago river.

We do not think the condemnation proceeding referred to in the bill is of any importance in the decision of this case. The bill alleges that when the petition was filed the city of Chicago held title to the land but conveyed it to appellant before the trial for a consideration of \$37,000, which was the amount paid for it by the city. The Metropolitan company was in possession of the land at the time and had been for several years, but was not made a party to the condemnation suit. Whatever rights it had it acquired from the city, and the grant to appellant was subject to those rights. After the grant from the city to the appellant a judgment was entered in the condemnation proceeding finding it was the owner of the land in dispute in this case, and said land was not taken into account in assessing damages in the condemnation suit. Appellant knew when it filed its petition for condemnation that the Metro-

politan company claimed some right in the land in dispute, for its bridge had been constructed and in use for eight years, and in 1898 appellant had, under an agreement with the Pennsylvania Railroad Company, constructed a by-pass on the west side of the land in dispute for the purpose of increasing the flow of water in the river, and in 1899 had entered into an agreement with the Metropolitan company by which appellant was to remove one hundred and four feet of the Metropolitan company's water tunnel which supplied it with water, and construct a new intake for said tunnel on the line of the west wall of the by-pass. The Metropolitan company not having been a party to the condemnation proceeding was not bound by the judgment in that case.

The bill alleges that the Metropolitan company never received any grant, license or permission from appellant or the city of Chicago to use the land in controversy, or any part thereof, upon which to construct or maintain any portion of its bridge. The ordinance adopted by the city council of the city of Chicago April 7, 1892, authorizing the Metropolitan West Side Elevated Railroad Company to construct, maintain and operate its railroad and branches, is made a part of the bill and its most material parts are set out in the statement preceding this opinion. The limits within which the railroad should be constructed are defined by the ordinance, and the company was authorized to construct its road across the south branch of the Chicago river by means of a bridge between Jackson street on the north and Congress street produced, on the south. A part of the land in controversy lies immediately south of Jackson street and extends about half way to VanBuren street, which is the next street south of Jackson. The Metropolitan company's bridge crosses the river practically midway between Jackson and VanBuren streets, and the bill alleges that said company excavated a large hole in the land in controversy and placed therein an abutment or foundation for its bridge.

The following plat will serve to show the shape and location of the land in controversy and the location of the bridge of the Metropolitan company:



Appellant contends that the city of Chicago acquired the land in dispute from the Pittsburg, Fort Wayne and Chicago Railway Company for a certain specified use and

purpose, namely, "straightening the south branch of the Chicago river between Adams street and VanBuren street;" that it held the land in trust for the public for that use and that it had no power or authority to devote it to any other use or purpose, and that if said city had attempted by an express grant to authorize the Metropolitan company to use a portion of the land for the support of its bridge its acts would have been void, and that therefore no estoppel can arise against the city or its grantee. The ordinance of April 7, 1892, under which the railroad and bridge were authorized to be constructed and maintained, contains no grant or permission to the Metropolitan company to use the land in dispute, but it does authorize said company to cross the Chicago river with its tracks "by means of a new bridge hereby authorized to be constructed by it upon such plans and in such manner as shall be approved by the commissioner of public works." The ordinance further provided that the said Metropolitan company's railroad and branches should be constructed under and subject to the inspection and supervision of the commissioner of public works and his assistants, and that the said road, branches and bridge might, within the limits defined, be constructed over, along, upon and across any lands which the company might acquire by lease, purchase, condemnation or otherwise. The bill alleges that the Metropolitan company took possession of a portion of the disputed premises whereon its bridge is partly constructed, on the first of June, 1894, and completed said bridge on or about May 1, 1895. The work of building the bridge was of such character and its location so public that it could not have been done without the knowledge of the city authorities. Besides, the ordinance required that it be constructed upon such plans and "in such manner" as the commissioner of public works should approve of. No objection appears to have been made by the city to the use of the land by the Metropolitan company for its bridge, and for eight years after its completion, and until

the city granted the land to appellant, in 1903, it raised no question as to the authority of the Metropolitan company to occupy the land and is not now questioning said company's right. The city of Chicago was made a defendant to the bill in this case and filed its demurrer thereto. The right of the Metropolitan company to use the land was first disputed by appellant when the bill in this case was filed, thirteen years after the completion of the bridge. The city of Chicago might have prevented the use of any portion of said land by the Metropolitan company when the bridge was constructed, but with full knowledge of the facts, and with the approval of the commissioner of public works, which must be presumed, it permitted said company to locate a portion of its bridge on said land and expend a considerable sum of money in so doing. It must be presumed, therefore, to have consented to said company's use of the said land.

There is no allegation in the bill as to the amount of money expended by the Metropolitan company in locating the abutment of its bridge on the disputed land, but the character of the structure and the uses made of it make it evident that the company was required to, and did, expend a substantial sum of money on appellant's land, and that to remove therefrom would cost another large sum. The bill alleges that the cost of removal would not exceed \$20,000. The question then arises whether the doctrine of equitable estoppel is applicable to the case.

Appellant contends that the same rules of law are applicable to this case that would be applicable if the land in controversy were part of the public street, and from this basis it is argued that the city of Chicago had no power either to expressly or by implication permit its occupation for other than public uses and purposes. We think it open to serious question whether the city was without authority to grant the use of the land to a public service corporation for the uses and purposes to which it was put by said cor-

poration, but if, as contended by appellant, the city was without such authority in the first instance, it does not follow that having permitted the use of the property, neither the municipality nor the public will be estopped from revoking such permission and re-possessing the property.

There is a line of cases in this State holding that permitting a public street or highway, or part thereof, to be and remain in the possession of a private party is not sufficient to create an estoppel against the municipality causing such street or highway to be vacated and re-opened. The public rights in the streets cannot be lost by the mere act of abandonment by the public authorities. Appellant has cited a number of cases so holding, in its brief, among them *City of DeKalb v. Luney*, 193 Ill. 185. In that case the city of DeKalb was enjoined, at the instance of a property owner, from removing a fence enclosing said owner's residence from what the city claimed was a public street. The evidence showed that some three and one-third feet of the street was inside the enclosure of the property owner. There were no improvements on the portion of the street inside said enclosure except a fence, a lilac bush, a creeping vine and possibly a maple tree about ten years old. The injunction was made perpetual by the circuit court on the ground that the city, having permitted a portion of the street to be enclosed and possessed for more than twenty years by a private party, was estopped from reclaiming it. This court reversed that decree and held that under the circumstances shown by the evidence the doctrine of estoppel did not arise, but it was recognized in that case that there are circumstances under which a private party may invoke the doctrine of estoppel against a municipal corporation and the public. On page 190 it was said: "It must appear, to create an equitable estoppel against the public in cases such as that at bar, not only that the city authorities have long withheld the assertion of control over the portion of the street in question, and that private parties have been,

by the acts of those representing the public, induced, in good faith, to believe the street has been abandoned by the public, but also that on the faith of that belief and with the acquiescence of those representing the public such private party has erected structures on the street or made improvements thereon of such lasting and valuable character that to permit the public to assert the right to re-possess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped."

In *People v. City of Rock Island*, 215 Ill. 488, this court said (p. 495): "It has frequently been decided that the doctrine of estoppel *in pais* is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of every one interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped. The doctrine has been applied in *Chicago, Rock Island and Pacific Railroad Co.*

v. *City of Joliet*, 79 Ill. 25, *Chicago and Northwestern Railway Co. v. People ex rel.* 91 id. 251, *County of Piatt v. Goodell*, 97 id. 84, *Martel v. City of East St. Louis*, 94 id. 67, and *City of Chicago v. Union Stock Yards and Transit Co.* 164 id. 224." The same rule was again announced in *People v. Wieboldt*, 233 Ill. 572.

It is not required that there shall be some affirmative act of the city upon which to base an estoppel, but it may arise out of long acquiescence and such conduct and acts as amount to ratification. *City of Chicago v. Union Stock Yards and Transit Co.* 164 Ill. 224.

In our opinion, under the facts as set out in the bill, the case is one for the application of the doctrine of equitable estoppel and must be controlled by the authorities above cited. That question being conclusive of the case, it is unnecessary to refer to other questions discussed by counsel in their brief and argument.

The demurrers to the bill were properly sustained by the circuit court, and its decree dismissing the bill is affirmed.

Decree affirmed.

INDEX.

ABANDONMENT.		PAGE.
when signing petition to vacate street is an abandonment of party's private easement therein.....	42	
ABATEMENT.		
survival of actions—rule where a person negligently injured dies from cause other than his injury.....	34	
administrator of person dying from negligent injury may sue administrator or executor of person whose negligence caused the injury.....	34	
ABSTRACT OF RECORD.		
abstract of record must disclose everything upon which error is assigned—when judgment will be affirmed for insufficiency of abstract of record.....	380	
testimony cannot be complained of on appeal if abstract of record shows no objection thereto.....	582	
ABSTRACTS OF TITLE.		
in specific performance the sufficiency of the abstract of title is to be determined as of the time when the abstract was to be delivered and the deal closed.....	514	
when abstract of title is defective.....	515	
ACCOUNTING.		
a stockholder must act with due diligence in seeking relief against the corporation for acts or omissions such as would naturally be within his knowledge.....	238	
what averments in bill by stockholder for accounting show <i>laches</i> in making demand—when <i>laches</i> in making demand will bar relief.....	238	
what is not such fraudulent concealment by complainant as precludes granting him relief in equity against persons using his funds to purchase land.....	384	
when it is not error to fail to credit amount of certain checks given by defendant to complainant.....	384	

ACTIONS AND DEFENSES.

PAGE.

when a decree dismissing bill to cancel tax deed does not bar second bill between same parties.....	15
survival of actions—rule where a person negligently injured dies from some cause other than his injury....	34
action for damages for negligent killing survives against personal representative of deceased wrongdoer.....	34
power of equity to enforce easement contract in favor of person not a party to the contract.....	43
wife residing in foreign State may bring suit for separate maintenance in the county in Illinois where the husband resides	92
when manager of grain elevator corporation may recover commissions from directors and officers though he participated in creating the excessive debt.....	103
equity will not assume jurisdiction solely to restore party to possession of land	145
bill for an injunction need not show, as part of complainant's <i>prima facie</i> case, that he has not been guilty of <i>laches</i> — <i>laches</i> is a matter of defense.....	145
a prosecution for ouster cannot be barred by lapse of time if there was no law authorizing the organization of the alleged corporation	155
intoxication of person at time of injury does not relieve him of duty to exercise due care, nor does it, of itself, preclude a recovery for the injury.....	169
an action of tort, where amount claimed is not over \$1000, is a fourth class case under Municipal Court act.....	177
the State, alone, can interfere where a corporation having power to hold real estate is claimed to have exceeded such power	183
the remedy by rescission of contract must be exercised in apt time by the parties to the contract.....	187
when prosecution of ejectment suit will not be enjoined.	187
use of court merely to determine what kind of a title complainant will get if he exercises a certain option, there being no real controversy, is improper.....	200
when executors of deceased trader cannot recover from stock brokers under section 132 of Criminal Code, on theory that the transactions were gambling ones.....	216
what averments in bill by stockholder for accounting show <i>laches</i> in making demand—when <i>laches</i> in making demand will bar relief	238
Statute of Limitations is no defense to amended declaration if original declaration stated a cause of action—what is the cause of action in personal injury case....	372

ACTIONS AND DEFENSES.— <i>Continued.</i>	PAGE.
defrauded party is bound by his election of remedies, but knowledge of facts is essential to constitute the bringing of a suit an election of remedies.....	384
when a court may, in foreclosure, settle priorities as between mortgagee and holder of unrecorded deed.....	435
right of a city to dismiss condemnation proceeding after judgment against part of defendants.....	460
<i>mandamus</i> will be awarded only when clear case is made.	471
what is not ground for compelling a railroad company to run trains in both directions over original line.....	472
proof that vendor's title is doubtful is a good defense to his bill for specific performance.....	514
when abstract of title is defective.....	515
to be fraud in law a representation must be an affirmation of a fact and not merely an agreement to do something in the future	521
what must be proved to warrant decree of specific performance of verbal contract to convey land.....	551
defendant who fails to set up defense of <i>laches</i> in his answer waives such defense	556
verbal agreement to extend time for redeeming from judicial sale is valid and not within Statute of Frauds...	556
question of assumed risk is not involved where injury to person working on building results from negligence of contractor who is not his employer.....	576
fact that statute upon which criminal charge is based is unconstitutional is no defense to a <i>scire facias</i> proceeding upon the forfeited recognizance.....	600
when city and its grantee are estopped to compel elevated railroad company to remove bridge abutment and surrender possession of the land.....	623

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

AGENCY.—See PRINCIPAL AND AGENT.

ALIBI.

a jury must consider whole evidence and not merely that touching defense of *alibi*, since the reasonable doubt of guilt must be upon the whole evidence..... 394

ALIMONY.

in separate maintenance case, temporary alimony may be allowed where ceremony is admitted—allowance of alimony is largely within discretion of trial court..... 92

AMENDMENTS.

PAGE.

- amendment inserting word "as" before word "receiver,"
in declaration, *præcipe* and summons, does not amount
to setting up a new cause of action..... 169
- the matter of allowing amendments in chancery cases is
largely within the chancellor's discretion..... 238
- when it is not error to refuse leave to further amend bill. 239

AMUSEMENT PARKS.

- what evidence in action for damages for frightening horse
by searchlight is sufficient to authorize the submission
of the case to the jury..... 177

ANIMALS.—See MALICIOUS MISCHIEF; HORSES.

ANTE-NUPTIAL CONTRACTS.

- when husband's failure to keep insurance policy in force
defeats his right to claim the wife's property under pro-
visions of ante-nuptial contract 423

APPEALS AND ERRORS.

- it is presumed, on appeal, that the chancellor disregarded
incompetent evidence 15
- a certificate of importance is not necessary, on appeal in
separate maintenance, if legality of the marriage is di-
rectly involved 93
- when instruction as to disregarding testimony of witnesses
who have been "successfully impeached" is not neces-
sarily a ground for reversal..... 113
- when instructions in personal injury case do not improp-
erly limit time for plaintiff's exercise of due care in
driving across street car tracks..... 128
- when appeal from decree dismissing bill for specific per-
formance should be taken directly to Supreme Court.. 132
- Appellate Court's finding upon a mixed question of law
and fact is conclusive upon Supreme Court..... 142
- what findings by Appellate Court are conclusive..... 142
- when freehold is involved upon appeal from decree dis-
missing bill for injunction..... 145
- effect where instructions for both parties in a negligence
case ignore question of plaintiff's intoxication..... 169
- appellee's brief should be a reply to points made by appel-
lant and should follow the order of their presentation. 205
- when instruction sufficiently shows the meaning of the re-
lation of fellow-servants..... 206
- error cannot be assigned on opinion of Appellate Court.. 215

APPEALS AND ERRORS.—*Continued.*

PAGE.

if Appellate Court's judgment is correct it will not be reversed because the reasons given in its opinion for such judgment are not sound.....	215
party obtaining affirmative relief by a decree must preserve the evidence upon which it is founded.....	215
party obtaining decree in full accordance with his claims cannot appeal from findings in the decree.....	215
purpose of statutory assignment of cross-errors—rule as to necessity for assigning cross-errors.....	215
appellee has a right to sustain the decree by any facts in the record without assigning cross-errors.....	215
no universal rule can be laid down to determine whether an order is final or interlocutory.....	230
when an order setting aside partition decree and granting leave to intervene and answer the bill will be regarded as interlocutory and not final.....	230
the matter of allowing amendments in chancery cases is largely within the chancellor's discretion.....	238
when it is not error to sustain demurrer to amended bill, deny leave to further amend and dismiss the bill.....	239
when alleged incompetent evidence of handwriting will not reverse conviction for falsifying public record.....	273
abstract of record must disclose everything upon which error is assigned—when judgment will be affirmed for insufficiency of abstract of record.....	380
judgment of circuit court is presumed to be correct, on appeal, until the contrary is shown.....	380
party is not entitled to have an instruction given which is not in proper form.....	394
when judgment of conviction for rape will be reversed..	394
when claim that answer must be taken as true is not borne out by the record—when filing of a replication will be held to have been waived.....	434
if Appellate Court affirms a judgment for failure of appellant to comply with its rules there is nothing which the Supreme Court can review on appeal.....	448
Appellate Court is required by statute to file an opinion giving the reasons for its decision—right of Supreme Court to consider such opinion.....	448
effect where opinion of Appellate Court does not clearly show reasons for affirming judgment—Supreme Court may remand without reversing.....	448
the Supreme Court cannot consider question of amount of damages in a personal injury case—appellee entitled to damages for delay if no other question is raised.....	469

APPEALS AND ERRORS.—*Continued.*

PAGE.

chancellor's findings of fact from oral testimony are not lightly disturbed on appeal.....	556
it is not error for an instruction in a personal injury case to assume as a fact what could not be controverted...	576
when error in refusing to admit testimony is harmless..	576
if testimony in a personal injury case is immaterial, as claimed by appellant, its admission will not reverse...	582
testimony cannot be complained of on appeal if abstract of record shows no objection thereto.....	582
when instruction upon subject of negligence in switching partly unloaded car of cinders is not misleading.....	583
Appellate Court's judgment of affirmance settles controverted fact of defendant's negligence.....	583
when judgment of conviction must be affirmed for want of a bill of exceptions.....	590
the chancellor's findings of fact from oral testimony will stand on appeal unless clearly wrong.....	592
when appeal in <i>scire facias</i> proceeding upon forfeited recognizance lies to Appellate Court—when alleged invalidity of statute does not give Supreme Court jurisdiction	601
Appellate Court's judgment of affirmance settles questions of credibility of witnesses and weight of evidence in an action for personal injuries.....	610
substantial repetitions of instructions need not be given..	610
party cannot complain of error in opponent's instructions if his own contain the same error.....	610
rulings on cross-examination must be clearly prejudicial to work a reversal	611
when freehold is involved in a proceeding for mandatory injunction to compel removal of bridge abutment.....	622
correct practice where appeal is taken to Supreme Court which should have been to Appellate Court is to transfer the cause to Appellate Court.....	623

ASSESSMENT FOR TAXES.—See TAXES.

ASSIGNMENT OF CROSS-ERRORS.—See CROSS-ERRORS.

ATTORNEYS AT LAW.

attorney who collects money for client should pay it over promptly, and may be disbarred if he uses it for his own purposes and cannot pay it over.....	89
an attorney who files bill for divorce and obtains decree without disclosing that another judge has dismissed the same bill may be suspended from practice.....	279

BAIL.

PAGE.

- purpose of *scire facias* on forfeited recognizance—whether cognizor was guilty of the criminal charge against him cannot be inquired into in such proceeding..... 600
- fact that statute upon which criminal charge is based is unconstitutional is no defense to a *scire facias* proceeding on the forfeited recognizance..... 600

BILLS OF EXCEPTIONS.

- when judgment of conviction must be affirmed for want of a bill of exceptions..... 590

BOARDS OF REVIEW.

- when equity has jurisdiction to enjoin collection of tax on original assessment by board of review—equity has jurisdiction if tax was unauthorized by law..... 27
- when widow and minor are improperly assessed..... 27
- a tax-payer is entitled to have assessment made by the board of assessors reviewed by the board of review although he failed to file any schedule..... 415
- board of review cannot remit the penalty fixed by board of assessors for failure to file a schedule..... 415
- rule where board of review changes an assessment made by the board of assessors which carries a penalty for a failure to file a schedule..... 415

BOUNDARIES.

- meander line is not ordinarily a boundary..... 290
- meander line provision of act of 1839 relating to canal lands was superseded by act of 1843..... 290
- purchasers of canal lands sold under act of 1843, and lying along Desplaines river own the bed of the river to the middle of the stream..... 290

BRIEFS.

- appellee's brief should be a reply to points made in appellant's brief and should follow order of their presentation. 205

BROKERS.

- when a stock broker is a "winner," under section 132 of the Criminal Code—it must appear that both parties intended to settle on differences, only..... 216
- sales and purchases of stocks by broker under a general order to use his discretion are not necessarily gambling transactions..... 216

BROKERS.—*Continued.*

PAGE.

- when executors of deceased trader cannot recover from stock brokers under section 132 of Criminal Code, on theory that the transactions were gambling ones..... 216

BURDEN OF PROOF.

- presumption is in favor of validity of marriage if a ceremony is proven—burden of proof is then upon party attacking validity of the marriage..... 92
- one asserting that transactions in stocks were gambling ones has the burden of proving the allegations of his bill in that respect..... 216
- party who claims a deed absolute in form to be conditional has the burden of proving his claim..... 453

CANALS.

- meander line provision of act of 1839 relating to canal lands was superseded by the act of 1843..... 290
- purchasers of canal lands sold under act of 1843 and lying along Desplaines river own the bed of the river to the middle of the stream—State does not own it..... 290
- an agreement for perpetual flowage is, in effect, a sale of an interest in land—how such agreement must be made by canal commissioners 292
- the flowage contract of September 2, 1904, between canal commissioners and Harold T. Griswold is not a perpetual license 292
- commissioners have power to lease "ninety-foot strip"... 292
- what is meant by lease of "water power," referred to in clause 6 of section 8 of Canal act of 1874..... 292
- the flowage contract and lease made September 2, 1904, are not a lease of "water power"..... 293
- provision of Canal act for renewing leases applies only to leases of water power and lands connected therewith.. 293
- invalidity of renewal provision of canal commissioners' lease does not render entire contract void if such provision is independent and severable..... 293
- what is not ground for setting aside deed to canal lands—deed of January 6, 1905, to "sixteen-acre tract" passed the entire title of the State..... 293
- the "Kankakee feeder" lease of August 8, 1905, is not a water power lease 294
- when lease by canal commissioners can be canceled only by the commissioners and not by the State..... 294
- Kankakee feeder lease is not within the joint resolution passed by the legislature in 1907..... 294

CANALS.—*Continued.*

PAGE.

- revocation provision of Kankakee feeder lease construed. 294
- canal commissioners have power to lease the abandoned Kankakee feeder—the “pole lease” of September 2, 1904, is not void. 294
- a contract made by the canal commissioners should be read in the light of the statute. 295
- contemporaneous agreements concerning the same subject matter should be construed together. 295

CARRIERS.—See RAILROADS; STREET RAILWAYS.

CASES CONTROLLED BY OTHERS.—See FORMER CASES.

- People v. Strassheim*, 240 Ill. 279, controls the decision in *People v. Haas* 575

CERTIFICATES OF ACKNOWLEDGMENT.

- certificate of acknowledgment to deed cannot be impeached by unsupported testimony of grantor—proof of fraud must be clear to overcome such a certificate. 604

CERTIFICATES OF IMPORTANCE.

- a certificate of importance is not necessary, on appeal in separate maintenance, if legality of the marriage is directly involved 93

CHANCERY.—See EQUITY.

CITIES.—See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

- when a decree dismissing bill to cancel tax deed does not bar second bill between same parties. 15
- possession under master's deed purporting to convey title is sufficient to enable party to maintain bill to cancel tax deed as a cloud on title. 15
- person in possession claiming ownership is entitled to notice before tax deed is issued. 15
- when a defendant should not be required to pay master's fees when his deed is canceled. 16
- when failure of the grantees of coal rights to keep their agreements does not authorize court of equity to cancel deed as a cloud on title. 521

CONSERVATORS.

- county court cannot appoint conservator for a person who is not a resident of the county. 381

CONSOLIDATION.—See RAILROADS.

CONSTITUTIONAL LAW.

PAGE.

- registration provision of City Election act is not unconstitutional, as a discrimination between voters in territory partly within and partly without the city..... 529

CONSTRUCTION.

- section 39 of the Chancery act and section 38 of the Evidence act should be construed together..... 15
- oral testimony properly reported by the master is "taken on the trial," within meaning of section 38 of Evidence act. 15
- in case of ambiguity of contract creating easement, resort may be had to practical construction of contract..... 42
- of section 16 of Corporations act, as fixing the *amount* of capital stock as the point where directors and officers must assume personal liability for debts..... 102
- when principle of contemporaneous construction of statute by executive officers has no application..... 156
- the whole act should be considered when construing a provision of a statute 177
- of Municipal Court act, as making action of tort, where amount claimed is not over \$1000, a fourth class case.. 177
- of meander line provision of act of 1839, relating to canal lands, as being superseded by act of 1843..... 290
- of clause 6 of section 8 of Canal act of 1874, as to meaning of leases of "water power"..... 292
- of contracts and leases upon which rights of the Economy Light and Power Company are based..... 292
- contemporaneous agreements relating to the same subject matter should be construed together..... 295
- of section 32 of the Local Improvement act, as to extent to which a condemnation judgment against land needed for local improvement is conditional..... 460
- of will, as not vesting legal title in executor as trustee.. 515
- of registration provision of City Election act, as not being unconstitutional for discrimination 529
- of Local Option act, as to petition for election being jurisdictional and as to its requirements where town is partly within city where City Election act is in force.. 529
- of deed, as to when rule in *Shelly's case* applies..... 536
- of will, as creating a tenancy in common and not a joint tenancy—what strengthens such view..... 543
- of section 2 of Inheritance Tax law, as not exempting remainders after life estates—of section 1 of such law, as to what is a "beneficial interest" in land..... 571

CONTRACTS.—See GAMBLING CONTRACTS.

PAGE.

after default in action on a written contract of guaranty the evidence should be limited to such proof as will enable court to fix and assess the damages.....	9
easements may be created by covenants or agreements as well as by grant—in case of ambiguity practical construction of parties may be resorted to.....	42
when note is within security of mortgage.....	132
a contract to convey by a good and sufficient warranty deed requires a title without encumbrance.....	132
an agreement for perpetual flowage is, in effect, a sale of an interest in land	292
contracts made by the canal commissioners should be read in the light of the statute.....	295
where one attempts to grant a greater estate than he has the conveyance will operate to pass estate which he has.	295
contemporaneous agreements relating to the same subject matter should be construed together.....	295
contract of infant is voidable by him though he is emancipated or in business—right of an infant to disaffirm his contract may be exercised at his option.....	398
the fact that contract is executed does not preclude disaffirmance by infant.....	398
executory contracts or contracts relating to personal property may be disaffirmed after or during minority.....	398
ante-nuptial contracts are generally recognized as valid..	423
legal title to land does not vest by contract, but party may acquire equitable title and compel specific performance.	423
when husband's failure to keep insurance policy in force defeats his right to claim the wife's property under provision of ante-nuptial contract.....	423
if the grantor by his own act prevents the grantee from keeping his agreements, which were the consideration for the deed, the deed will not be set aside.....	441
proof that vendor's title is doubtful is a good defense to his bill for specific performance.....	514
in specific performance the sufficiency of the abstract of title is determined as of the time when the abstract was to be delivered and the deal closed.....	514
when abstract of title is defective.....	515
to be fraud in law a representation must be an affirmation of a fact and not merely an agreement to do something in the future	521
when failure of the grantees of coal rights to keep their agreements does not justify court of equity in canceling the deed as for fraud.....	521

CONTRACTS.—*Continued.*

PAGE.

a breach of contract in an ordinary business transaction does not constitute fraud in law.....	521
what must be proved to warrant a decree of specific performance where the contract to convey is verbal—what proof is not sufficient	551
a verbal agreement to extend time to redeem from judicial sale is valid and not within Statute of Frauds.....	556

CORPORATIONS.—See MUNICIPAL CORPORATIONS.

statutory liability of directors is for indebtedness in excess of the <i>amount</i> of the capital stock.....	102
directors may incur indebtedness to the amount of capital stock without assuming personal liability.....	102
section 16 of the Corporations act takes no account of the property or assets of a corporation but only of amount of its capital stock.....	102
the personal liability of directors and officers is that of a surety, and if the excessive indebtedness is paid out of the assets the directors and officers are exonerated....	103
directors and officers of corporation are liable if they assent to the creation of excessive debt, even though they are not liable by merely recognizing its existence.....	103
when manager of grain elevator corporation may recover commissions from directors and officers though he participated in creating the excessive debt.....	103
it is against public policy of Illinois for a corporation to hold real estate beyond what is necessary for the business or specific purposes of the corporation.....	155
corporation cannot be organized to acquire and hold real estate or to buy or lease land and construct and operate an office building	155
corporation may be organized for any purpose authorized by law and may hold such real estate as is necessary to carry out such purpose.....	156
a prosecution for ouster cannot be barred by lapse of time if there was no statute authorizing the organization of the alleged corporation.....	156
grantor cannot have deed set aside upon ground that corporation grantee exceeded its power in taking the real estate, which was residence property.....	183
the State, alone, can interfere where it is claimed that a corporation having power to hold real estate has exceeded such power.....	183
what is a sufficient averment of complainant's relation as a stockholder in the defendant corporation.....	238

CORPORATIONS.—*Continued.*

PAGE.

what averments in bill by stockholder for accounting show <i>laches</i> in making demand—when <i>laches</i> in making demand will bar relief.....	238
a stockholder must act with due diligence in seeking relief against the corporation for acts or omissions such as would naturally be known to him.....	238
infant may disaffirm purchase of capital stock and recover the purchase money	398
cancellation of stock certificate amounts to a surrender of the stock and restoration to corporation.....	399

COSTS.

when a defendant should not be required to pay master's fee when his deed is canceled.....	15
--	----

COURTS.—See APPEALS AND ERRORS; EQUITY.

attorney who collects money for client and uses it for his own purposes, so that he cannot pay it over, is guilty of misconduct and may be disbarred.....	89
Appellate Court's finding upon a mixed question of law and fact is conclusive upon Supreme Court.....	142
what findings by Appellate Court are conclusive.....	142
what constitutes public policy—a change in public policy must be made by legislature and not by courts.....	155
an action of tort, where the amount claimed is not over \$1000, is a fourth class case under Municipal Court act.	177
use of court merely to determine what kind of a title the complainant will get if he exercises a certain option, there being no real controversy, is improper.....	200
court should dismiss bill for divorce upon learning that it has been dismissed for want of equity by another judge, whether the prior adjudication is pleaded or not.....	279
an attorney who files bill for divorce and obtains decree without disclosing that another judge has dismissed the same bill may be suspended from practice.....	279
where affirmance by Appellate Court is for a failure to comply with its rules there is nothing which Supreme Court can review on appeal	448
Appellate Court is required by statute to file an opinion giving the reasons for its decision—right of the Supreme Court to consider such opinion.....	448
effect where opinion of Appellate Court does not clearly show the reasons for affirming judgment—the Supreme Court may remand without reversing.....	448

CREDITORS.—See DEBTOR AND CREDITOR.

CRIMINAL LAW.

	PAGE.
when the People are not required to make an election in prosecution for falsifying jail calendar.....	273
when alleged incompetent evidence of handwriting of accused will not work reversal—what is not ground for disregarding testimony of witness.....	273
when defendant is not prejudiced by jury's taking alleged falsified record with them on retirement.....	274
an intent to falsify a public record is a criminal intent..	274
the right of a party to an instruction is the right to an instruction in proper form—an instruction referring to evidence of <i>alibi</i> alone is improper.....	394
jury should consider all the evidence and not merely that touching the <i>alibi</i>	394
when judgment convicting accused of crime of rape will be reversed	394
an intent to kill animal need not be proved to sustain conviction for malicious mischief under section 203 of division 1 of Criminal Code.....	482
malice toward owner of animal, whoever he may be, must be proved to sustain conviction for malicious mischief for castrating a bull.....	482
inference of malice is one of fact for the jury.....	482
offense of cruelty to animals is distinct from offense of malicious mischief in killing or wounding animal.....	482
proof that killing of animal was "absolutely" necessary to protect defendant's property is not required.....	482
right of person to protect his property.....	483
what evidence is admissible in malicious mischief prosecution upon question of defendant's motive—what is admissible as tending to show want of malice.....	483
when verdict imposing fine of \$550 in malicious mischief prosecution for castrating a bull is excessive.....	483

CROSS-ERRORS.

purpose of statutory assignment of cross-errors—rule as to necessity for assigning cross-errors.....	215
appellee has a right to sustain a decree by any facts in the record without assigning cross-errors.....	215

CROSS-EXAMINATION.

matter of cross-examination rests largely with trial court— rulings must be clearly prejudicial to work reversal...	611
--	-----

CRUELTY TO ANIMALS.

offense of cruelty to animals is distinct from offense of malicious mischief for killing or wounding animal....	482
---	-----

CUSTOMS.

PAGE.

- duty of a master to make rules for conducting business
with different branches—effect of an established custom
where no rule exists 205
- when violation of established custom by a switch tender
tends to show negligence on his part which renders his
employer liable 206

DAMAGES.

- the Supreme Court cannot consider question of amount of
damages in personal injury case—appellee is entitled to
damages for delay if no other question is raised..... 469
- when allowance of \$300 as damages on dissolution of in-
junction is not excessive..... 567

DEBTOR AND CREDITOR.

- personal liability of directors and officers of corporation is
for indebtedness in excess of the *amount* of its capital
stock and not the value thereof..... 102
- the liability of a secret partner does not extend to indi-
vidual contracts of other partners with respect to their
personal transactions 113
- a debt which a solvent executor owed the estate must be
treated as paid and as assets in his hands although he
subsequently becomes insolvent..... 409

DECLARATIONS.—See EVIDENCE.

DECREES.—See JUDGMENTS AND DECREES.

DEDICATION.

- plat cannot be partly statutory and partly common law.. 43
- failure of some of the land owners to acknowledge a plat
in person destroys the effect of entire plat as a statu-
tory dedication 43
- offered dedication may be withdrawn before acceptance. 268
- making of plat is a mere offer to dedicate..... 268
- dedication, though by formal plat, is incomplete until ac-
ceptance, and a conveyance of lots before acceptance
carries title to center of street..... 268
- owner of platted ground who sells lots before acceptance
of dedication has no reversionary interest in portion of
street upon which the lots abut..... 268
- dedication of a park for a particular purpose cannot be
changed by city or legislature—binding force of restric-
tions against erecting buildings 496

DEDICATION.—*Continued.*

PAGE.

- reclaimed land in Lake Front park in Chicago is subject to terms of original dedication and no buildings of any kind can be built thereon..... 497
- what is necessary to establish a highway by dedication—there can be no acceptance by the public of an offer not made to the public..... 566

DEEDS.—See TAX DEEDS.

- when deed made by grantor as executrix may be presumed to have been made in due course of administration.... 109
- what is a sufficient delivery of deeds executed contemporaneously with a will..... 120
- what facts concerning earlier transactions do not tend to show that the grantor intended to retain control over deeds and will..... 120
- what declaration by grantor is not inconsistent with intention to part with control over deeds..... 120
- fact that custodian of deeds testifies that he would have given deeds back to grantor if he had asked for them is not material 121
- deed cannot be set aside upon ground that the certificates of stock which were the consideration were surreptitiously taken by third party..... 183
- grantor cannot have deed set aside upon ground that corporation grantee exceeded its power in taking the real estate, which was residence property..... 183
- what is not ground for setting aside deed to canal lands—deed of January 6, 1905, to "sixteen-acre tract" of canal land passed entire title of the State..... 293
- where one attempts to grant a greater estate than he has, conveyance is operative to pass estate which he has... 295
- the law does not presume undue influence in case of deed from a parent to child—when grantee need not prove good faith 366
- mere fact that the grantor was old and feeble is not alone ground for setting aside his deeds..... 366
- when rights of holder of unrecorded deed from mortgagor are subject to lien of the mortgage..... 435
- if grantor by his own act prevents grantee from keeping his agreement to support the grantor, which was the consideration, the deed will not be set aside..... 441
- party who claims that a deed absolute in form was conditional has the burden of proving such claim..... 453
- when deed from husband to wife will be held to be unconditional and to have been delivered..... 453

DEEDS.—*Continued.*

PAGE.

mere fact that grantor becomes dissatisfied with his bargain is not ground for setting aside the deed.....	453
when remainder created by deed is contingent.....	511
rule relating to conveyances made in consideration of support of the grantor for life does not apply to ordinary transactions of bargain and sale.....	521
when failure of the grantees of coal rights to keep their agreements does not justify setting aside the deed in equity as for fraud	521
when rule in <i>Shelly's case</i> applies to deed—it is no objection to application of rule that life estate is in one-half the land and the remainder in whole tract.....	537
when a deed from widow to administrator's wife will not be set aside except upon the proof of actual influence by the administrator	592
evidence reviewed and held insufficient to show that the grantor did not have capacity to make deed.....	592
certificate of acknowledgment to deed cannot be impeached by unsupported testimony of grantor—proof of fraud must be clear to overcome certificate of acknowledgment	604
what does not overcome certificate of acknowledgment..	604
a charge of fraud in procuring deed is inconsistent with claim that the deed was voluntarily executed through exercise of undue influence.....	605

DEFAULT.

default admits material allegations of declaration.....	9
after default in action on written contract the evidence is limited to assessment of damages.....	9

DEFENSES.—See ACTIONS AND DEFENSES.

DEFINITIONS.

rule in <i>Shelly's case</i> defined.....	536
joint tenancy defined	542

DELIVERY.—See DEEDS.

DIRECTORS.—See CORPORATIONS.

DISBARMENT.

attorney who collects money for client and uses it for his own purposes, so that he cannot pay it over, is guilty of misconduct, and may be disbarred.....	89
--	----

DISBARMENT.—*Continued.*

PAGE.

- an attorney who files bill for divorce and obtains decree without disclosing that another judge has dismissed the same bill may be suspended from practice..... 279

DIVORCE.

- public has an interest in divorce suit which must be considered, regardless of attitude of parties—divorce will not be granted upon consent or collusion..... 279
- court should dismiss bill for divorce upon learning that the bill has previously been dismissed by another judge on the same evidence..... 279
- an attorney who files bill for divorce and obtains decree without disclosing that another judge has dismissed the bill may be suspended from practice..... 279
- a wife granted a divorce for desertion has no ground to complain, on appeal, that it was not granted for cruelty. 453

DRAM-SHOPS.—See LOCAL OPTION.

DRUNKENNESS.

- intoxication of person at time of injury does not relieve him from duty to exercise due care, nor does it, of itself, bar a recovery for his injury..... 169
- an intoxicated person must use the degree of care for his safety which a person not intoxicated would have used under the same circumstances 169
- effect where instructions for both parties in a negligence case ignore question of plaintiff's intoxication..... 169

DUE CARE.—See NEGLIGENCE.

EASEMENTS.

- easements may be created by covenants or by agreements as well as by grant..... 42
- if easement agreement is ambiguous, resort may be had to practical construction by the parties..... 42
- when signing petition to vacate street is an abandonment of the party's private easement therein—such act binds party's successors in title..... 42
- property owners consenting to vacation of street are estopped to demand that original conditions be restored. 42
- when easement is appurtenant and not in gross..... 42
- easement created by a grantor in favor of lands retained by him is appurtenant and is binding upon subsequent purchasers from the grantees..... 42

EASEMENTS.—*Continued.*

	PAGE.
word "heirs" need not be used in order to make an easement a perpetual one	42
power of equity to enforce an easement contract in favor of person not a party to the contract.....	43
when easement in favor of abutting lot will embrace territory included in vacated street.....	43
when lots cannot claim benefit of easement contract although it was originally intended to benefit such lots..	43
when use of switch track to haul coal and cinders will be enjoined as being an excessive use of the easement...	43
easement in use of switch track cannot be availed of to benefit non-dominant lots.....	43
the distinction between ownership of bed of navigable and non-navigable streams	290
an agreement for perpetual flowage is, in effect, a sale of an interest in land—when flowage contract is not a perpetual license	292

EJECTMENT.

when deed made by grantor as executrix may be presumed to have been made in due course of administration...	109
when prosecution of ejectment suit will not be enjoined.	187
owner of platted tract who sells lots before acceptance of dedication has no reversionary interest in the portions of streets upon which the lots abut.....	268

ELECTION OF REMEDIES.

when the People are not required to make an election in prosecution for falsifying jail calendar.....	273
defrauded party is bound by his election of remedies, but knowledge of facts is essential to constitute the bringing of a suit an election of remedies.....	384

ELECTIONS.

registration provision of City Election act is not unconstitutional, as a discrimination between voters in territory partly within and partly outside city.....	529
petition for local option election required by Local Option act is jurisdictional—when the petition must state that signers are "duly registered" legal voters.....	529
how local option election should be held in a town which is partly within and partly outside the limits of a city where City Election act is in force.....	529
how petition for local option election should be prepared in a town lying partly within and partly outside a city where City Election act is in force.....	529

ELECTRIC COMPANIES.

PAGE.

- what evidence tends to show negligence by electric company in permitting live wire to fall..... 252
- electric company is liable for an injury resulting from attempt to remove live wire as a source of danger..... 253
- when electric company's negligence is not the proximate cause of injury from fallen live wire..... 253

EMINENT DOMAIN.

- the extent to which condemnation judgment against land needed for local improvement is conditional..... 460
- right of a city to dismiss condemnation proceeding after judgment against part of defendants..... 460
- one not a party to condemnation suit is not bound by the judgment nor deprived of his rights..... 622

EQUITABLE ESTOPPEL.—See ESTOPPEL.

EQUITY.

- section 39 of Chancery act and section 38 of Evidence act should be construed together—when all of the evidence should be taken by the master..... 15
- oral testimony properly reported by the master is "taken on the trial," within the meaning of section 38 of the Evidence act 15
- when fact that chancellor hears part of evidence after referring case to a master is not a substantial departure from proper procedure..... 15
- when record of former action is not admissible—chancellor is presumed, on appeal, to have disregarded incompetent evidence 15
- when equity has jurisdiction to enjoin collection of tax on original assessment by board of review—equity has jurisdiction if tax was unauthorized by law..... 27
- power of equity to enforce easement contract in favor of person not a party to the contract..... 43
- when use of switch track to haul coal and cinders will be enjoined, as being an excessive use of easement..... 43
- equity will not assume jurisdiction solely to determine the right to possession of land between party claiming that right and one holding adversely..... 145
- deed cannot be set aside upon ground that the certificates of stock, which were the consideration, were surreptitiously taken by third party..... 183
- where the equities are equal the law must prevail—when prosecution of ejectment suit will not be enjoined.... 187

EQUITY.—*Continued.*

PAGE.

grantor cannot have deed set aside upon ground that corporation grantee exceeded its power in taking the real estate, which was residence property.....	183
use of a court of equity for business reasons, merely to determine what kind of a title complainant will get if he exercises a certain option, is improper.....	200
remedy by rescission of conveyance for mistake must be availed of in apt time by parties to the conveyance....	187
after leave is given to intervene in partition the evidence in support of the intervenor's answer to the bill should be heard on the final hearing of the case.....	230
the matter of allowing amendments in chancery cases is largely within the chancellor's discretion.....	238
averments of cross-bill are not considered in determining the sufficiency of the original bill.....	238
when a court may, in foreclosure, settle priorities as between mortgagee and holder of unrecorded deed.....	435
if grantor by his own act prevents grantee from keeping his agreement to support grantor, which was the consideration for the deed, the deed will not be set aside..	441
mere fact that grantor becomes dissatisfied with his bargain is not ground for setting aside the deed.....	453
when deed from husband to wife will be held to be unconditional and to have been delivered.....	453
court will not compel a vendee to accept a clouded title—proof that vendor's title is doubtful is a good defense to his bill for specific performance.....	514
service by publication—sufficiency of notice that a decree has been entered—what notice does not bar petition to open decree filed within three years.....	514
when failure of the grantees of coal rights to keep their agreements does not justify court of equity in canceling deed as for fraud.....	521
equity will permit redemption from a foreclosure sale where owner of equity of redemption has been misled.	556
court of equity will look to the substance of a written instrument rather than to its form.....	556
when allowance of \$300 as damages on dissolution of injunction is not excessive.....	567
equity will grant relief upon proper averments and proof that confidence has been reposed and betrayed.....	592
when deed from widow to administrator's wife will not be set aside in equity except upon proof of actual influence by administrator	592

ESTOPPEL.

PAGE.

property owners who consent to vacating of a street are estopped to demand that original condition be restored.	42
when manager of grain elevator corporation may recover commissions from directors and officers though he participated in creating the excessive debt.....	103
when consent of city to use of its land by elevated railroad company for bridge abutment must be presumed..	623
an affirmative act by a city is not necessary to create an equitable estoppel—when city and its grantee are estopped to compel removal of bridge abutment.....	623

EVIDENCE.

after default in action on written contract the evidence is limited to assessment of damages.....	9
oral testimony properly reported by the master is "taken on the trial," within meaning of section 38 of the Evidence act	15
when record of former suit is not admissible.....	15
presumption is in favor of validity of marriage if a ceremony is proven—burden of proof is then upon party attacking validity of the marriage.....	92
what shows a sufficient delivery of deeds executed contemporaneously with a will.....	120
what facts concerning an earlier transaction do not tend to show that the grantor intended to retain control over deeds and will.....	120
what declaration by grantor is not inconsistent with intention to part with control over deeds.....	120
fact that custodian of deeds testifies that he would have given deeds back to grantor if he had asked for them is not material.....	121
what is not such a variance between averments and proof in a foreclosure proceeding as precludes foreclosure for the amount due.....	132
what evidence in action for damages for frightening horse by a searchlight is sufficient to authorize the submission of the case to the jury.....	177
what tends to show negligence by switch tender.....	206
one asserting that stock transactions were gambling ones has the burden of proving the allegations of his bill in that respect	216
what facts do not justify the inference that stock transactions were gambling ones.....	216
what evidence tends to show negligence by electric company in permitting live wire to fall.....	252

EVIDENCE.—*Continued.*

PAGE.

when evidence does not tend to show that electric company's negligence was the proximate cause of an injury from a fallen live wire.....	253
when alleged incompetent evidence of handwriting will not reverse conviction for falsifying public record.....	273
what is not ground for disregarding testimony of witness.	273
party alleging that stream is navigable has the burden of proving that fact—what need not be shown to prove the navigability of stream.....	291
law does not presume undue influence in case of a deed from parent to child—when grantee is not required to prove good faith.....	366
fact that a grantor divides property unequally among his children is not evidence of mental weakness or undue influence—when deed will not be set aside.....	366
when question of assumed risk is for the jury.....	373
a party who claims a deed absolute in form to be conditional has the burden of proving his claim.....	453
what evidence is admissible in malicious mischief prosecution upon question of defendant's motive—what admissible as tending to show want of malice.....	483
any evidence fairly tending to show want of malice is admissible in a malicious mischief prosecution.....	483
what must be proved to warrant a decree of specific performance where the contract to convey is verbal—what proof is not sufficient.....	551
if testimony in a personal injury case is immaterial, as claimed by appellant, its admission will not reverse...	582
testimony cannot be complained of on appeal if abstract of record shows no objection thereto.....	582
what evidence tends to show negligence in switching a partly unloaded car of cinders.....	582
as to matters not concerning administration, the question whether administrator stood in fiduciary relation to the widow is one of fact for proof.....	592
evidence reviewed and held insufficient to show that the grantor did not have mental capacity to make deed...	592
certificate of acknowledgment to deed cannot be impeached by unsupported testimony of grantor—proof of fraud must be clear to overcome certificate of acknowledgment	604
place where body of coal miner was found after explosion is not conclusive that deceased was at such place when the explosion occurred.....	610
matter of cross-examination rests largely with trial court—rulings must be clearly prejudicial to work reversal...	611

EVIDENCE.—*Continued.*

PAGE.

- proof that the deceased supported his family is proper,
whether action is brought under section 33 of the Mines
act or section 2 of the Injuries act..... 611
- when consent of city to use of its land by elevated rail-
road company for bridge abutment must be presumed.. 623

EXECUTORS AND ADMINISTRATORS.

- action for damages for negligent killing survives against
personal representative of deceased wrongdoer..... 34
- when deed made by executrix may be presumed to have
been made in due course of administration..... 109
- when executors of deceased trader cannot recover from
stock brokers under section 132 of Criminal Code, on
theory that the transactions were gambling ones..... 216
- a debt which a solvent executor owed to the estate must
be treated as paid and as assets in his hands though he
subsequently becomes insolvent..... 409
- when denial of petition to sell land to pay debts is proper. 409
- when executor does not represent heir-at-law..... 514
- distinction between directions to executor to sell and a de-
vise to executor with power to sell..... 515
- when legal title remains in heirs and does not vest in ex-
ecutor as trustee..... 515
- as to matters concerning administration the relation be-
tween administrator and widow is fiduciary..... 592
- as to matters not concerning administration, the question
whether administrator stood in fiduciary relation to the
widow is one of fact for proof..... 592
- when deed from widow to administrator's wife will not be
set aside except upon proof of actual influence by the
administrator..... 592

FALSIFYING PUBLIC RECORDS.

- when the People are not required to make an election in
prosecution for falsifying a jail calendar..... 273
- when defendant is not prejudiced by jury's taking alleged
falsified record with them on retirement..... 274
- an intent to falsify a public record is a criminal intent... 274

FELLOW-SERVANTS.

- when concurring negligence of a fellow-servant does not
excuse master from liability..... 206
- when instruction sufficiently shows the meaning of the re-
lation of fellow-servants..... 206

FELLOW-SERVANTS.—*Continued.*

PAGE.

- co-operation must be in the particular employment and not merely in general business—whether relation of fellow-servants exists is a mixed question of law and fact... 402
- when question of fellow-servants becomes one of law.... 402
- members of a freight crew not necessarily fellow-servants of another crew though in same "chain gang"..... 402

FIDUCIARY RELATIONS.

- law presumes undue influence by grantee in case of deed from client to attorney, ward to guardian or child to parent—such grantees must prove good faith..... 366
- as to matters concerning administration the relation between administrator and widow is fiduciary..... 592
- as to matters not concerning administration, the question whether administrator stood in fiduciary relation to the widow is a question of fact..... 592
- equity will grant relief upon proper averments and proof that confidence has been reposed and betrayed..... 592
- when deed from widow to administrator's wife will not be set aside except upon proof of actual influence by the administrator..... 592
- when a fiduciary relation does not exist between grantor and grantees 605

FINDINGS OF FACT.

- Appellate Court's finding upon a mixed question of law and fact is conclusive upon Supreme Court..... 142
- what findings by Appellate Court are conclusive..... 142

FORECLOSURE.—See MORTGAGES.

FORMER CASES.

- Gage v. Ewing*, 114 Ill. 15, followed, as to when decree dismissing bill to cancel tax deed as a cloud does not bar second bill between same parties..... 15
- Holton v. Daily*, 106 Ill. 131, explained, as to an action for death by negligence surviving against the executor of wrongdoer 34
- Clark v. Clark*, 172 Ill. 355, explained, as to when deed by executrix may be presumed to have been made in due course of administration..... 109
- Burrall v. Am. Tel. Co.* 224 Ill. 266, and *Spalding v. M. & W. I. Ry. Co.* 225 id. 585, distinguished, as to when allegation of possession is essential to bill for injunction. 145

FORMER CASES.—Continued.

PAGE.

- Imperial Building Co. v. Board of Trade*, 238 Ill. 100, adhered to, as to there being no authority for organizing corporation to acquire and hold real estate..... 155
- Rector v. Hartford Deposit Co.* 190 Ill. 380, distinguished, as to there being no authority for organizing corporation to buy or lease land and construct office building.. 156
- Hamilton v. C., B. & Q. R. R. Co.* 124 Ill. 235, followed, as to effect of sale of lots in platted tract before acceptance of offered dedication of streets..... 268
- Hubbard v. Bell*, 54 Ill. 110, and *Schulte v. Warren*, 218 id. 108, followed, as to what is necessary in order to make a stream a navigable one..... 292
- Chicago Mutual Life Indemnity Ass. v. Hunt*, 127 Ill. 257, explained, as to right of an infant to disaffirm his contract though it is executed..... 398
- Snap v. People*, 19 Ill. 80, explained, as to rule that malice toward owner of animal must be proved under section 203 of Criminal Code, relating to malicious mischief. 482
- Chicago v. Ward*, 169 Ill. 392, and *Bliss v. Ward*, 198 id. 104, adhered to, as to there being no right to erect buildings on original Lake Front park or on reclaimed land. 497
- C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454, explained, as to force of judgments of Supreme Court as *res judicata*. 497
- Lehndorf v. Cope*, 122 Ill. 317, and *Welliver v. Jones*, 166 id. 80, distinguished, as to when remainder is contingent. 511
- White v. White*, 231 Ill. 298, distinguished, as to what does not warrant specific performance of oral contract. 551
- In re Estate of Kingman*, 220 Ill. 563, explained, as to what is the "beneficial interest" of a child in real estate under section 1 of Inheritance Tax act..... 571
- Jones & Adams Co. v. George*, 227 Ill. 64, and *McCarthy v. Spring Valley Coal Co.* 232 id. 473, distinguished, as to competency of proof that deceased supported family. 611

FRAUD.—See STATUTE OF FRAUDS.

- a party whose funds have been fraudulently used to purchase land may affirm the purchase or seek other remedies, but he is bound by his election of remedies..... 384
- knowledge of the facts is essential to constitute bringing of a suit an election of remedies..... 384
- what is not such fraudulent concealment by complainant as precludes granting him relief in equity against persons using his funds to purchase land..... 384
- a breach of contract in an ordinary business transaction does not constitute fraud in law..... 521

FRAUD.—*Continued.*

PAGE.

- to be fraud in law a representation must be an affirmance of a fact and not merely an agreement to do something in the future..... 521
- a rule relating to conveyances made in consideration of support of grantor for life does not apply to ordinary transactions of bargain and sale..... 521
- when failure of the grantees of coal rights to keep their agreements does not justify setting aside the deed in equity as for fraud..... 521
- proof of fraud must be clear to overcome certificate of acknowledgment to deed..... 604
- a charge of fraud in procuring execution of deed is inconsistent with claim that a deed was voluntarily executed through exercise of undue influence..... 605

FREEHOLD.

- when freehold is involved upon appeal from decree dismissing bill for injunction..... 145
- when freehold is involved in a proceeding for mandatory injunction to compel removal of bridge abutment:.... 622

GAMBLING CONTRACTS.

- one who asserts that transactions in stocks were gambling ones has the burden of proving the allegations of his bill in that respect..... 216
- when a stock broker is a "winner," under section 132 of the Criminal Code—it must appear that both parties intended to settle on differences, only..... 216
- what facts do not justify the inference that stock transactions were gambling ones..... 216
- sales and purchases of stocks by broker under a general order to use his discretion are not necessarily gambling transactions..... 216
- when executors of deceased trader cannot recover from stock brokers under section 132 of the Criminal Code, on theory that the transactions were gambling ones.... 216

GUARANTY.

- after default in action on written contract of guaranty the evidence should be limited to such proof as will enable the court to fix and assess the damages..... 9

HANDWRITING.

- when alleged incompetent evidence of handwriting will not reverse conviction for falsifying public record.... 273

HIGHWAYS.—See STREETS AND ALLEYS.	PAGE.
when signing of petition to vacate street is an abandonment of party's private easement therein—his act binds his successors in title.....	42
when easement in abutting lot will embrace territory of vacated street—effect of consenting to vacation of street.	42
failure of part of land owners to acknowledge plat in person destroys effect of entire plat as a statutory dedication of streets and alleys.....	43
when allegation of possession by complainant is essential to a bill to enjoin alleged encroachment upon premises described in the bill as a private street.....	145
what is necessary to establish a public street by dedication—there can be no acceptance by the public of an offer not made to the public.....	566
what is necessary in order to establish a public street by prescription—use for which land was set apart by the owner is presumed to continue.....	566
when allowance of \$300 as damages on dissolution of injunction is not excessive.....	567

HORSES.

what evidence in action for damages for frightening horse by a searchlight is sufficient to authorize the submission of the case to the jury.....	177
---	-----

HUSBAND AND WIFE.—See MARRIAGE.

public has an interest in a divorce suit, which must be considered regardless of attitude of parties—a divorce cannot be granted upon consent or collusion of parties.	279
when husband's failure to keep insurance policy in force defeats his right to claim the wife's property under provisions of ante-nuptial contract.....	423
wife granted divorce for desertion has no ground to complain, on appeal, that it was not granted for cruelty..	453
when deed from husband to wife will be held to be unconditional and to have been delivered.....	453

ILLEGAL CONTRACTS.—See GAMBLING CONTRACTS.

ILLINOIS AND MICHIGAN CANAL.—See CANALS.

INFANTS.

amount which a minor must contribute towards debts of estate should not be assessed as his personal estate—how such amount is measured.....	27
---	----

INFANTS.—*Continued.*

PAGE.

effect of failure of minors to get consent of parents or guardians to marriage.....	92
contract of infant is voidable by him though he is emancipated or in business—right of infant to disaffirm his contract may be exercised at his option.....	398
fact that infant's contract is executed does not preclude his disaffirmance of it.....	398
voluntary payments made by an infant may be recovered by him—rule as to returning consideration.....	398
contracts relating to personal property or executory contracts may be disaffirmed by an infant either after or during his minority.....	398
infant may disaffirm purchase of capital stock of corporation and recover the purchase money.....	398
provision of decree that certificate of stock held by infant be canceled amounts to a surrender of the stock by the infant and restoration to the corporation.....	399

INHERITANCE TAX.

section 2 of the Inheritance Tax act does not exempt remainders after life estates but only certain life estates enumerated in the statute.....	571
what is the "beneficial interest" of a child in real estate under section 1 of Inheritance Tax act.....	571
person should be taxed, under Inheritance Tax law, only on the beneficial interest he receives.....	571

INJUNCTION.

when equity has jurisdiction to enjoin collection of tax on original assessment by board of review—equity has jurisdiction if tax was unauthorized by law.....	27
power of equity to enforce easement contract in favor of person not a party to the contract.....	43
when use of switch track to haul coal and cinders will be enjoined, as being an excessive use of easement....	43
equity will not assume jurisdiction solely to determine the right to possession of land between a party claiming that right and one holding adversely.....	145
when allegation that complainant is in possession is essential to bill to enjoin alleged encroachment on premises described as a private street.....	145
bill for injunction need not show, as a part of complainant's <i>prima facie</i> case, that he has not been guilty of laches—laches is a matter of defense.....	145

INJUNCTION.—*Continued.*

PAGE.

- where equities are equal law must prevail—when prosecution of ejectment suit will not be enjoined..... 187
- when allowance of \$300 as damages on dissolution of injunction is not excessive..... 567
- when a freehold is involved in proceeding for mandatory injunction to compel removal of bridge abutment..... 622
- when a city and its grantee are estopped to compel elevated railroad company to remove bridge abutment and surrender possession of land..... 623

INJURIES.—See NEGLIGENCE.

INSTRUCTIONS.

- when an instruction as to disregarding testimony of witnesses who have been "successfully impeached" is not necessarily ground for reversal..... 113
- when instructions in a personal injury case do not improperly limit time for plaintiff's exercise of due care in driving across street car tracks..... 128
- effect where instructions for both parties in a negligence case ignore question of plaintiff's intoxication..... 169
- when an instruction sufficiently shows the meaning of the relation of fellow-servants..... 206
- party is not entitled to have an instruction given which is not in proper form..... 394
- an instruction on defense of *alibi* is not in proper form which refers to the evidence of *alibi* only..... 394
- it is not error for an instruction in a personal injury case to assume as a fact that which could not be controverted under the facts of the case..... 576
- when instruction upon subject of negligence in switching partly unloaded car of cinders is not misleading..... 583
- substantial repetition of instructions need not be given.. 610
- party cannot complain of error in opponent's instructions if his own contain the same error..... 610

INTENT.

- an intent to falsify a public record is a criminal intent.. 274

INTEREST.

- when interest should not be decreed against a defendant upon granting redemption from foreclosure sale..... 556

INTERLOCUTORY ORDERS.—See JUDGMENTS.

INTERVENING PETITIONS.

PAGE.

- when an order setting aside partition decree and granting leave to intervene and answer the bill will be regarded as interlocutory and not final..... 230
- after leave is given to intervene in partition the evidence in support of the intervenor's answer to the bill should be heard on the final hearing of the case..... 230

INTOXICATION.—See DRUNKENNESS.

JOINT TENANCY.

- joint tenancy defined—at common law, words of negation were necessary to avoid creating a joint tenancy—survivorship is chief characteristic of joint tenancy..... 542
- the act of 1821 practically abolished joint tenancies in Illinois, except as to estates held by trustees or others in *autre droit*..... 542
- act of 1827 modified act of 1821 and permitted creation of joint tenancies by use of express words..... 542
- words used must clearly show intention to create a joint tenancy and not a tenancy in common..... 543
- when will creates a tenancy in common and not a joint tenancy—what provision of will strengthens view that estate was intended to be in common..... 543

JUDGMENTS AND DECREES.

- when decree dismissing bill to cancel tax deed as a cloud does not bar second bill..... 15
- no universal rule can be laid down to determine whether an order is final or interlocutory..... 230
- when an order setting aside partition decree and granting leave to intervene and answer the bill will be regarded as interlocutory and not final..... 230
- a decree dismissing a bill for divorce after hearing of the complainant's evidence is a final decree..... 279
- court should dismiss bill for divorce upon learning that it has been dismissed by another judge for the want of equity, whether prior adjudication is pleaded or not... 279
- provision of decree that certificate of stock held by infant be canceled amounts to a surrender of the stock by the infant and restoration to the corporation..... 399
- prior to passage of the Local Improvement act of 1907 a condemnation judgment was conditional upon the petitioner's acceptance of the land..... 460
- the extent to which condemnation judgment against land needed for local improvement is conditional..... 460

JUDGMENTS AND DECREES.—*Continued.*

PAGE.

- what notice that decree has been entered does not bar petition to open decree filed within three years..... 514
- one not a party to a condemnation suit is not bound by the judgment nor deprived of his rights..... 622

JUDICIAL SALES.

- when party has no right to complain that land was sold without a right of redemption—when decree against a *bona fide* purchaser is not wrongful..... 384
- denial of petition to sell lands to pay debts is proper if deficiency of assets is due to the executor's failure to charge himself with a debt he owed the estate..... 409
- a debt which a solvent executor owed the estate must be treated as paid and as assets in his hands though he subsequently becomes insolvent..... 409
- verbal agreement to extend time to redeem from judicial sale is valid—when equity will permit redemption from foreclosure sale..... 556
- when interest should not be decreed against a defendant upon decreeing redemption from foreclosure sale..... 556

JURISDICTION.

- when equity has jurisdiction to enjoin collection of tax on original assessment by board of review—equity has jurisdiction if tax was unauthorized by law..... 27
- a certificate of importance is not necessary on appeal in separate maintenance if legality of the marriage is directly involved..... 93
- when appeal from decree dismissing bill for specific performance should be taken directly to Supreme Court.. 132
- equity will not assume jurisdiction solely to restore party to possession of land..... 145
- when freehold is involved upon appeal from decree dismissing bill for injunction..... 145
- an action of tort, where the amount claimed is not over \$1000, is a fourth class case under Municipal Court act. 177
- county court cannot appoint conservator for a person who is not a resident of the county..... 381
- service by publication—sufficiency of notice that a decree has been entered—what notice does not bar petition to open decree within three years..... 514
- when executor does not represent heir-at-law..... 514
- petition for a local option election is jurisdictional—when petition must state that signers are "duly registered" legal voters—petition must comply with statute..... 529

JURISDICTION.—*Continued.*

PAGE.

when appeal in *scire facias* proceeding on forfeited recognition lies to Appellate Court—when alleged invalidity of statute does not give Supreme Court jurisdiction. 601

LACHES.

a bill for injunction need not show, as part of complainant's *prima facie* case, that he has not been guilty of *laches*—*laches* is a matter of defense. 145

a prosecution for ouster cannot be barred by lapse of time if there was no law authorizing the organization of the alleged corporation. 156

a stockholder must act with due diligence in seeking relief against the corporation for acts or omissions, such as would naturally be within his knowledge. 238

what averments in a bill by a stockholder for accounting show *laches* in making demand—when *laches* in making demand will bar relief. 238

a defendant who fails to set up defense of *laches* in his answer waives such defense. 556

LEASES.

invalidity of an independent and severable covenant for renewal of a lease does not render entire contract void. 293

provision giving one party the right to terminate a lease without other's consent must be strictly construed. . . . 294

canal commissioners' leases, under which Economy Light and Power Company claims, construed. 294

LIMITATIONS.

amendment inserting word "as" before word "receiver," in declaration, *præcipe* and summons, does not amount to setting up a new cause of action. 169

Statute of Limitations is no defense to amended declaration if original declaration stated a cause of action—what is the cause of action in a personal injury case. . . 372

when amendments do not state a new cause of action—when changing averments as to facts of notice and a promise to repair do not make a new case. 372

LOCAL OPTION.

petition for local option election required by Local Option act is jurisdictional—when petition must state that the signers are "duly registered" legal voters. 529

how local option election should be held in a town which is partly within the limits of a city where City Election act is in force. 529

LOCAL OPTION.—*Continued.*

PAGE.

how petition for local option election should be prepared
where town is partly within limits of city where the
City Election act is in force..... 529

LUNATICS.

county court cannot appoint conservator for person who
is not a resident of the county..... 381

MALICIOUS MISCHIEF.

an intent to kill animal need not be proved to sustain conviction for malicious mischief under section 203 of division 1 of the Criminal Code..... 482
malice toward owner of animal, whoever he may be, must be proved to sustain conviction for malicious mischief for castrating a bull..... 482
inference of malice in a malicious mischief prosecution for castrating a bull is one of fact for the jury..... 482
offense of cruelty to animals is distinct from offense of malicious mischief in killing or wounding animal..... 482
proof that killing of animal was "absolutely" necessary to protect defendant's property is not required..... 482
right of person to protect his property..... 483
what evidence is admissible in malicious mischief prosecution on question of defendant's motive—what admissible as tending to show want of malice..... 483
when verdict imposing fine of \$550 in malicious mischief prosecution for castrating a bull is excessive..... 483

MANDAMUS.

writ will be awarded only when clear case is made..... 471
when question of unlawful consolidation of railroads can not be inquired into 'in a *mandamus* proceeding..... 471
what is not ground for compelling railroad to run trains in both directions over its original line..... 472

MARRIAGE.

legality of marriage in foreign State is adjudged by its laws when the marriage is questioned in Illinois..... 92
the presumption is in favor of the validity of a marriage if a marriage ceremony is proven..... 92
effect of failure of minors to obtain consent of parents.. 92
when marriage in Indiana is not void..... 92
wife residing in foreign State may bring suit for separate maintenance in the county in Illinois where husband resides—alimony..... 92

MASTER AND SERVANT.—See MINES. PAGE.

- when relation of master and servant exists—when switch tender employed by one railroad company is not the servant of another railroad company..... 205
- duty of a master to make rules for conducting business with different branches—effect of an established custom where no rule exists..... 205
- when railroad company is liable for an injury caused by negligence of its switch tender..... 205
- when concurring negligence of a fellow-servant does not excuse master from liability..... 206
- when changing averments as to facts of notice and promise to repair do not make a new case..... 372
- when question of assumed risk is for the jury..... 373
- the members of a freight crew are not necessarily fellow-servants of members of another crew though both crews are in the same "chain gang" on same division..... 402

MASTERS IN CHANCERY.

- when case is referred to master to take evidence and report his conclusions or state an account the master must take all the evidence, including oral testimony..... 15

MAXIMS.

- where the equities are equal the law must prevail..... 187

MEANDER LINES.—See BOUNDARIES.

MERGER.

- possible merger of life estate and remainder in ancestor does not prevent application of rule in *Shelly's case*... 537

MINES.

- place where body of coal miner was found after explosion is not conclusive that deceased was at such place when the explosion occurred..... 610
- section 18 of Mines act, relating to inspection, is for protection of all employees, including engineers, firemen, pumpmen, shot-firers and drivers..... 610
- mine manager may also act as mine examiner..... 610
- proof that deceased supported family is proper, whether the action is under section 33 of the Mines act or under section 2 of the Injuries act..... 611

MINORS.—See INFANTS.

MORTGAGES.

PAGE.

what is not such variance between averments and proof as precludes foreclosure for amount due.....	132
when note is within security of mortgage.....	132
when filing of replication in foreclosure case will be held to have been waived.....	434
parties claiming through mortgagor are proper parties to foreclosure, and when brought in the court may pass upon and settle their rights.....	434
when rights of holder of unrecorded deed from mortgagor are subject to lien of mortgage.....	434
when a court may, in foreclosure, settle priorities as between mortgagee and holder of unrecorded deed.....	435
equity will permit redemption from foreclosure sale where owner of equity of redemption has been misled.....	556
court of equity will look to the substance rather than to the form of a written instrument.....	556

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

right of a city to dismiss condemnation proceeding after judgment against part of the defendants.....	460
the dedication of a park for particular purpose cannot be changed by city or legislature—binding force of restrictions against erecting buildings.....	496
cities and park boards are creatures of the legislature—power of legislature over municipal corporations.....	496
judgments of Supreme Court against agency of State in control of park are binding upon successive agencies of State in control of such park.....	497
reclaimed land in Lake Front park in Chicago is subject to terms of original dedication and no buildings of any kind can be built thereon.....	497
registration provision of City Election act is not unconstitutional as for discrimination.....	529
how local option election should be held in town which is partly within the limits of a city where the City Election act is in force.....	529
how petition for local option election should be prepared where town is partly within limits of city where City Election act is in force.....	529
what is necessary to establish a public street by dedication—there can be no acceptance by the public of an offer not made to the public.....	566
when consent of city to use of its land by elevated railroad company for bridge abutment must be presumed..	623

MUNICIPAL CORPORATIONS.—*Continued.*

PAGE.

- what is necessary to establish a public street by prescription—use for which land was set apart by the owner is presumed to continue..... 566
- an affirmative act by a city is not necessary to create an equitable estoppel—when city, and its grantee with notice, are estopped to demand removal of abutment.... 623

MUNICIPAL COURTS.—See COURTS.

NAVIGABLE STREAMS.—See WATERS.

NEGLIGENCE.

- administrator of person dying from negligent injury may sue the administrator or executor of person whose negligence caused the injury..... 34
- survival of actions—rule where person negligently injured dies from cause other than his injury..... 34
- when instructions in personal injury case do not improperly limit time for the plaintiff's exercise of due care in driving across street car tracks..... 128
- intoxication of person at time of injury does not relieve him from duty to exercise due care, nor does it, of itself, bar his recovery for the injury..... 169
- an intoxicated person must use the degree of care for his safety which a person not intoxicated would do under the same circumstances..... 169
- effect where instructions for both parties ignore question of plaintiff's intoxication..... 169
- amendment inserting word "as" before word "receiver," in declaration, *præcipe* and summons, does not amount to setting up a new cause of action..... 169
- action of tort where amount claimed is not over \$1000 is included in fourth class cases under Municipal Court act. 177
- what evidence in action for damages for frightening horse by a searchlight is sufficient to authorize the submission of the case to the jury..... 177
- when relation of master and servant exists—when switch tender employed by one railroad is not the servant of another railroad..... 205
- duty of the master to make rules for conducting business with different branches—effect of an established custom where no rule exists..... 205
- a person is bound to anticipate results naturally following his acts—when railroad company is liable for injury caused by negligence of switch tender..... 205

NEGLIGENCE.—*Continued.*

	PAGE.
nearest independent cause which is adequate to produce and does bring about an injury is the proximate cause and supersedes any remote cause.....	205
when violation of established custom by a switch tender tends to show negligence.....	206
the fact that injury is partly due to negligence of fellow-servant does not excuse master's negligence which was the proximate cause of the injury.....	206
what evidence tends to show negligence by electric company in permitting live wire to fall.....	252
a negligent act need not be the sole cause or the last or nearest cause to be the proximate cause of an injury..	252
injury must be the natural and probable result of the alleged negligence to make such negligence the proximate cause—how such question is determined.....	252
when a negligent act which furnishes a condition which makes injury possible is not the proximate cause.....	252
when the intervening act of third person does not excuse original wrongdoer.....	252
first negligent act is not proximate cause of injury if intervening independent act of third person has broken connection between first negligence and injury.....	252
test in determining question of proximate cause.....	253
electric company is liable for an injury resulting from attempt to remove live wire as a source of danger.....	253
when electric company's negligence is not the proximate cause of injury from fallen live wire.....	253
Statute of Limitations is no defense to amended declaration if original declaration stated a cause of action....	372
when amendments do not state a new cause of action—when changing averments as to facts of notice and a promise to repair do not state a new case.....	372
when question of assumed risk is for the jury.....	373
whether relation of fellow-servants exists is ordinarily a mixed question of law and fact—co-operation must be in the particular employment.....	402
the members of freight crew are not necessarily fellow-servants of members of another crew though both crews are in same "chain gang" on same division.....	402
question of assumed risk is not involved where injury to person working on building results from negligence of contractor who is not such person's employer.....	576
a person working on building is not bound to anticipate that servants of another master will be negligent in the manner of performing their work.....	576

NEGLIGENCE.—*Continued.*

PAGE.

contractor owes duty to other persons working on same building to use care to avoid injuring them.....	576
it is not error for an instruction in a personal injury case to assume as a fact that which could not be controverted under the facts of the case.....	576
what evidence tends to show negligence in switching a partly unloaded car of cinders.....	582
when question of defendant's notice of way in which car of cinders had been partly unloaded is for the jury....	583
when the fact that someone else was also negligent is no defense.....	583
when instruction concerning alleged negligence in switching partly unloaded car is not misleading.....	583
Appellate Court's judgment of affirmance settles the controverted fact of defendant's negligence.....	583
Appellate Court's judgment of affirmance settles questions of credibility of witnesses and weight of evidence in a personal injury case.....	610
place where body of coal miner was found after explosion is not conclusive that deceased was at such place when the explosion occurred.....	610
section 18 of Mines act, relating to examination, is for protection of all employees, including engineers, firemen, pumpmen, shot-firers and drivers.....	610
a mine manager may also act as mine examiner.....	610
proof that deceased supported his family is proper.....	611

NOTICE.

person in possession of land, claiming ownership, is entitled to notice before tax deed is issued.....	15
service by publication—sufficiency of notice that a decree has been entered—what notice does not bar petition to open decree filed within three years.....	514
possession of grantee is notice of his rights though his deed is not recorded, and one who deals with the grantor takes subject to the prior grantee's rights.....	598

OUSTER.

a prosecution for ouster cannot be barred by lapse of time if there was no law authorizing the organization of the alleged corporation.....	156
---	-----

PARKS.—See AMUSEMENT PARKS.

the dedication of a park for particular purpose cannot be changed by city or legislature—binding force of restrictions against erecting buildings.....	496
--	-----

PARKS.—*Continued.*

PAGE.

- cities and park boards are creatures of legislature—power of legislature over municipal corporations..... 496
- judgments of Supreme Court against agency of State in control of park are binding upon successive agencies of State having control of such park..... 497
- reclaimed land in Lake Front park in Chicago is subject to terms of original dedication and no buildings of any kind can be built thereon..... 497

PARTIES.

- parties claiming through mortgagor are proper parties to a foreclosure suit, and when brought in the court may pass upon and settle their rights..... 434
- when executor does not represent heir-at-law..... 514
- service by publication—sufficiency of notice that a decree has been entered—what notice does not bar petition to open decree within three years..... 514

PARTITION.

- when an order setting aside partition decree and granting leave to intervene and answer the bill will be regarded as interlocutory and not final..... 230
- after leave is given to intervene in partition the evidence in support of the intervenor's answer to the bill should be heard on the final hearing of the case..... 230

PARTNERSHIP.

- the liability of secret partner does not extend to private transactions of other partners beyond the scope of the partnership business..... 113

PETITIONS.—See ELECTIONS.

PLATS.

- plat cannot be partly statutory and partly common law... 43
- failure of some of the land owners to acknowledge plat in person destroys effect of entire plat as a statutory dedication of streets and alleys..... 43
- making of plat is a mere offer to dedicate—offered dedication may be withdrawn before acceptance, in absence of any element of estoppel..... 268
- dedication, though by formal plat, is incomplete until acceptance, and a conveyance of lots before acceptance carries title to center of street..... 268

PLEADING.

PAGE.

pleading to declaration after demurrer admits sufficiency of declaration—demurrer is properly sustained to pleas presenting an issue of law, only.....	9
default admits material allegations of declaration.....	9
what is not such variance between averments and proof in a foreclosure proceeding as precludes foreclosure for the amount due.....	132
when allegation that complainant is in possession is essential to bill to enjoin alleged encroachment on premises described as a private street.....	145
a bill for injunction need not show, as part of complainant's <i>prima facie</i> case, that he has not been guilty of <i>laches</i> — <i>laches</i> is a matter of defense.....	145
amendment inserting word "as" before word "receiver," in declaration, <i>præcipe</i> and summons, does not amount to setting up a new cause of action.....	169
what is a sufficient averment of complainant's relation as a stockholder in the defendant corporation.....	238
averments of cross-bill will not be considered in determining sufficiency of the original bill.....	238
what averments in bill by stockholder for accounting show <i>laches</i> in making demand—when <i>laches</i> in making demand will bar relief.....	238
the matter of allowing amendments in chancery cases is largely within the chancellor's discretion.....	238
when it is not error to sustain demurrer to amended bill, deny leave to further amend and dismiss the bill.....	239
Statute of Limitations is no defense to amended declaration if original declaration stated a cause of action—what is the cause of action in a personal injury case..	372
when amendments do not state a new cause of action—when changing averments as to facts of notice and a promise to repair do not make a new case.....	372
when filing of replication in foreclosure will be deemed to have been waived.....	434
when court may, under the pleadings in foreclosure, settle priorities as between mortgagee and the holder of an unrecorded deed from mortgagor.....	435
a defendant who fails to set up defense of <i>laches</i> in his answer waives such defense.....	556
after verdict all intendments are taken in favor of the pleading—when declaration in a personal injury case is sufficient after verdict.....	576

POSSESSION.

PAGE.

possession of grantee is notice of his rights though deed is not recorded, and one who deals with the grantor takes subject to the prior grantee's rights..... 598

POWERS.

distinction between directions to executor to sell and a devise to executor with power to sell..... 515

PRACTICE.

after default in action on written contract the evidence should be limited to assessment of damages..... 9

section 39 of Chancery act and section 38 of Evidence act should be construed together—when master should take all the evidence..... 15

oral testimony properly reported by the master is "taken on the trial," within meaning of section 38 of the Evidence act..... 15

when fact that chancellor hears part of evidence after referring a case to master is not a substantial departure from proper procedure..... 15

when appeal from decree dismissing bill for specific performance should be taken directly to Supreme Court.. 132

use of court merely to determine what kind of a title complainant will get if he exercises a certain option, there being no real controversy, is improper..... 200

appellee's brief should be a reply to points made by appellant and should follow the order of their presentation.. 205

error cannot be assigned upon opinion of Appellate Court. 215

if Appellate Court's judgment is correct it will not be reversed because reasons given in its opinion are unsound. 215

party obtaining affirmative relief by a decree must preserve the evidence upon which it is based..... 215

a party who obtains a decree in full accordance with his claims cannot appeal from findings in the decree..... 215

purpose of statutory assignment of cross-errors—rule as to necessity for assigning cross-errors..... 215

appellee has a right to sustain decree by any facts in the record without assigning cross-errors..... 215

when an order setting aside partition decree and granting leave to intervene and answer the bill will be regarded as interlocutory and not final..... 230

after leave is given to intervene in partition the evidence in support of the intervenor's answer to the bill should be heard on the final hearing of the case..... 230

judgment of circuit court is presumed to be correct, on appeal, until the contrary is shown..... 380

PRACTICE.—*Continued.*

PAGE.

abstract of record must disclose everything upon which error is assigned—when judgment will be affirmed for insufficiency of abstract of record.....	380
if Appellate Court affirms a judgment for failure of appellant to comply with its rules there is nothing which the Supreme Court can review on appeal.....	448
Appellate Court is required by statute to file an opinion giving the reasons for its decision—right of Supreme Court to consider such opinion.....	448
effect where opinion of Appellate Court does not clearly show reasons for affirming judgment—Supreme Court may remand without reversing.....	448
the Supreme Court cannot consider question of amount of damages in personal injury case—appellee is entitled to damages for delay if no other question is raised.....	469
when allowance of \$300 as damages on dissolution of injunction is not excessive.....	567
when judgment of conviction must be affirmed for want of a bill of exceptions.....	590
if appeal should have been taken to Appellate Court the Supreme Court will not dismiss the appeal on motion but will transfer cause to Appellate Court.....	623

PRESCRIPTION.

what is necessary to establish a public street by prescription—use for which land was set apart by owner is presumed to continue.....	566
---	-----

PRESUMPTIONS.

presumption is in favor of validity of marriage if a marriage ceremony is proven.....	92
when deed made by executrix may be presumed to have been made in due course of administration.....	109
it is a general presumption that the title of a purchaser from a riparian owner extends as far as the grantor owned, in both fresh and tidal waters.....	290
when law presumes undue influence by grantee.....	366
law does not presume undue influence in case of a deed from parent to child.....	366
when consent of city to use of its land by elevated railroad company for bridge abutment must be presumed..	623

PRINCIPAL AND AGENT.

liability of a secret partner does not extend to personal transactions of other partners beyond the scope of the partnership business.....	113
--	-----

PRINCIPAL AND AGENT.—*Continued.*

PAGE.

- when a stock broker is a "winner," under section 132 of the Criminal Code—it must appear that both parties intended to settle on differences, only..... 216
- sales and purchases of stocks by broker under a general order to use his discretion are not necessarily gambling transactions..... 216
- when executors of deceased trader cannot recover from stock brokers under section 132 of Criminal Code, on theory that the transactions were gambling ones..... 216

PRIORITY.

- when rights of holder of unrecorded deed from mortgagor are subject to the lien of the mortgage..... 434

PROCEDURE.—See PRACTICE.

PROXIMATE CAUSE.

- nearest independent cause which is adequate to produce and does bring about an injury is the proximate cause and supersedes any remote cause..... 205
- a negligent act need not be the sole cause or the last or nearest cause to be the proximate cause of an injury.. 252
- injury must be the natural and probable result of the negligence charged—how such question is determined.... 252
- when a negligent act which furnishes a condition which makes injury possible is not the proximate cause..... 252
- when intervening negligent act of third person does not excuse the original wrongdoer..... 252
- first negligent act is not proximate cause if an intervening independent act of third person breaks the connection between first negligence and the injury..... 252
- test in determining question of proximate cause..... 253
- electric company is liable for injury resulting from attempt to remove live wire as a source of danger..... 253
- when electric company's negligence is not the proximate cause of injury from fallen live wire..... 253

PUBLIC POLICY.

- what constitutes public policy—change in public policy is question for legislature and not the courts..... 155
- it is against the public policy of Illinois for a corporation to hold real estate beyond what is necessary for the business or purposes of the corporation..... 155
- corporation cannot be organized to acquire and hold real estate or to buy or lease land and erect and operate an office building..... 155

PUBLIC POLICY.—*Continued.*

PAGE.

- railroad company has a certain discretion in operating its trains—company will not be compelled to furnish facilities for demands that may never exist..... 471
- cities and park boards are creatures of legislature—power of legislature over municipal corporations..... 496
- the dedication of a park for particular purpose cannot be changed by city or legislature..... 496

RAILROADS.

- when relation of master and servant exists—when switch tender employed by one railroad company is not the servant of another railroad company..... 205
- duty of a master to make rules for conducting business with different branches—effect of an established custom where no rule exists..... 205
- when railroad company is liable for injury caused by negligence of its switch tender..... 205
- when concurring negligence of fellow-servant of injured person does not excuse railroad company from liability for the injury..... 206
- the members of freight crew are not necessarily fellow-servants of members of another crew though both crews are in the same "chain gang" on same division..... 402
- when question of unlawful consolidation of railroads can not be inquired into in a *mandamus* proceeding—what does not amount to a re-location of line of railroad... 471
- a railroad company has a certain discretion in matter of operating its road—company will not be compelled to furnish facilities for demands that may never exist... 471
- what is not ground for compelling a railroad company to run trains in both directions over original line..... 472
- what evidence tends to show negligence in switching a partly unloaded car of cinders..... 582
- when question of defendant's notice of way in which car of cinders had been partly unloaded is for the jury.... 583
- when fact that someone else was negligent is no defense. 583
- when instruction upon subject of negligence in switching partly unloaded car of cinders is not misleading..... 582

RAPE.

- when judgment of conviction for rape will be reversed.. 394

REAL PROPERTY.—See WILLS; MORTGAGES.

- when easement is appurtenant and not in gross..... 42
- when use of switch track to haul coal and cinders may be enjoined as an excessive use of easement..... 43

REAL PROPERTY.—*Continued.*

	PAGE.
what shows a sufficient delivery of deeds executed contemporaneously with a will.....	120
law does not presume undue influence in case of a deed from parent to child—when deed will not be set aside.	366
rule where an estate is to vest upon the happening of an event—legal title does not vest by contract.....	423
when husband's failure to keep insurance policy in force defeats his right to claim the wife's property under the provisions of an ante-nuptial contract.....	423
if the grantor by his own act prevents the grantee from keeping his agreements, which were the consideration for the deed, the deed will not be set aside.....	441
when deed from husband to wife will be held to be unconditional and to have been delivered.....	453
when remainder created by deed is contingent.....	511
rule in <i>Shelly's case</i> is a rule of property in Illinois....	536
rule in <i>Shelly's case</i> defined—application of rule does not depend upon quantity of estate given the ancestor....	536
all heirs who take as heirs must take by descent.....	536
limitation to heirs by that name as a class requires the inheritance so limited to vest in the first taker.....	536
requisites of rule in <i>Shelly's case</i>	536
estate of ancestor and that of heir need not be of same quantity—life estate may be in one-half of the property and the remainder in the whole tract.....	537
effect of a merger of life estate and remainder in ancestor—under the rule in <i>Shelly's case</i> there is no contingent remainder	537
when an estate in remainder vests at once—when rule in <i>Shelly's case</i> applies to deed.....	537
joint tenancy defined—at common law words of negation were necessary to avoid creating a joint tenancy—survivorship is chief characteristic of joint tenancy.....	542
the act of 1821 practically abolished joint tenancies in Illinois, except as to lands held by trustees or others <i>in autre droit</i>	542
act of 1827 modified act of 1821 and permitted creation of joint tenancies by use of express words.....	542
words used must clearly show intention to create a joint tenancy and not a tenancy in common.....	543
possession of grantee is notice of his rights though deed is not recorded, and one who deals with the grantor takes subject to the prior grantee's rights.....	598
what possession by grantee is notice.....	598

RECOGNIZANCES.—See BAIL.

RECORDING LAWS.

PAGE.

- when rights of holder of unrecorded deed from mortgagor are subject to the lien of the mortgage..... 434
- possession of grantee is notice of his rights though his deed is not recorded, and one who deals with the grantor takes subject to the prior grantee's rights..... 598

REDEMPTION.

- when a party is not entitled to complain that land was sold without a right of redemption..... 384
- verbal agreement to extend time to redeem from judicial sale is valid—when equity will permit redemption from a foreclosure sale..... 556
- when interest should not be decreed against a defendant when redemption from foreclosure sale is decreed.... 556

REGISTRATION.—See ELECTIONS.

REMAINDERS.

- when remainder created by deed is contingent..... 511
- under the rule in *Shelly's case* there is no contingent remainder—when estate in remainder vests at once..... 537
- when rule in *Shelly's case* applies to deed—fact that life estate is in one-half the property and remainder is in whole tract does not prevent application of rule..... 537

REMEDIES.—See ACTIONS AND DEFENSES.

REPRESENTATIONS.—See FRAUD.

RESCISSION.

- remedy by rescission of conveyance for mistake must be availed of in apt time by parties to conveyance..... 187

RES JUDICATA.

- when decree dismissing bill to cancel tax deed does not bar second bill between same parties..... 15
- a decree dismissing a bill for divorce after a hearing of complainant's evidence is a final decree..... 279
- court should dismiss bill for divorce upon learning that it has been dismissed for want of equity by another judge, whether the prior adjudication is pleaded or not..... 279
- judgments of Supreme Court against agency of State in control of park are binding upon successive agencies of State having control of such park..... 497

RES JUDICATA.—*Continued.*

PAGE.

- reclaimed land in Lake Front park in Chicago is subject to terms of original dedication and no buildings of any kind can be built thereon..... 497
- one not a party to a condemnation suit is not bound by the judgment nor deprived of his rights..... 622

REVENUE.—See TAXES.

RIPARIAN RIGHTS.—See WATERS.

ROADS AND BRIDGES.—See HIGHWAYS.

SALES.—See JUDICIAL SALES.

- contract of infant is voidable by him though he is emancipated or in business—right of infant to disaffirm his contract may be exercised at his option..... 398
- voluntary payments made by an infant may be recovered by him—rule as to returning consideration..... 398

SCIRE FACIAS.

- the purpose of *scire facias* on a forfeited recognizance—whether cognizor was guilty of the criminal charge can not be inquired into in such proceeding..... 600
- fact that statute upon which criminal charge is based is unconstitutional is no defense to a *scire facias* proceeding upon the forfeited recognizance..... 600
- when appeal in *scire facias* proceeding lies to Appellate Court—alleged invalidity of the act on which criminal charge is based gives Supreme Court no jurisdiction.. 601

SECRET PARTNERS.—See PARTNERSHIP.

SEPARATE MAINTENANCE.

- legality of marriage in foreign State is adjudged by its laws when marriage is questioned in Illinois..... 92
- presumption is in favor of validity of marriage if a marriage ceremony is proven—effect of failure of minors to obtain consent of parents..... 92
- when marriage in Indiana is not void..... 92
- a wife residing in foreign State may bring suit for separate maintenance in the county in Illinois where the husband resides..... 92
- temporary alimony may be allowed if ceremony is admitted—matter of alimony is largely within the discretion of the trial court..... 92
- when a certificate of importance is not necessary, on appeal, in a separate maintenance proceeding..... 93

SETTLEMENT OF ESTATES.—See EXECUTORS.

SHELLY'S CASE.—See REAL PROPERTY.

SPECIAL ASSESSMENTS.

PAGE.

- prior to the passage of Local Improvement act of 1907 a condemnation judgment was conditional upon the petitioner's acceptance of the land..... 460
- the extent to which condemnation judgment against land needed for local improvement is conditional—section 32 of Local Improvement act construed..... 460
- right of a city to dismiss condemnation proceeding after judgment against part of defendants..... 460

SPECIFIC PERFORMANCE.

- a contract to convey by a good and sufficient warranty deed requires a title free from encumbrance..... 132
- when appeal from decree dismissing bill for specific performance should be taken directly to Supreme Court.. 132
- court will not compel a vendee to accept a clouded title—proof that vendor's title is doubtful is a good defense to his bill for specific performance..... 514
- sufficiency of abstract of title is to be determined as of time abstract was to be furnished and deal closed.... 514
- when abstract of title is defective..... 515
- what must be proved where agreement to convey is verbal—what proof is not sufficient to warrant decree of specific performance of verbal contract..... 551

STATUTE OF FRAUDS.

- verbal agreement to extend time to redeem from judicial sale is valid and not within the Statute of Frauds..... 556

STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTITUTIONAL LAW; CONSTRUCTION.

- when principle of contemporaneous construction of statute by executive officers has no application..... 156
- the whole act should be considered when construing a provision of a statute..... 177

STOCKHOLDERS.—See CORPORATIONS.

STOCK TRANSACTIONS.—See GAMBLING CONTRACTS.

STREAMS.—See WATERS.

STREET RAILWAYS.

PAGE.

- when instructions in personal injury case do not improperly limit time for plaintiff's exercise of due care in driving across street car tracks..... 128

STREETS AND ALLEYS.—See HIGHWAYS.

- making of plat is a mere offer to dedicate—offered dedication may be withdrawn before acceptance in absence of any element of estoppel..... 268
- dedication, though by formal plat, is incomplete until acceptance, and a conveyance of lots before acceptance carries title to center of street..... 268
- owner of platted tract who sells lots before acceptance of dedication has no reversionary interest in the portions of streets upon which the lots abut..... 268

SURVIVAL OF ACTIONS.

- administrator of person dying from negligent injury may sue the administrator or executor of person whose negligence caused the injury..... 34
- if a person negligently injured dies from his injuries the only action which can be maintained is that given by statute for the benefit of widow and next of kin..... 34
- rule where person injured dies from some other cause.. 34

TAX DEEDS.

- when decree dismissing bill to cancel tax deed does not bar second bill between same parties..... 15
- possession under master's deed purporting to convey title is sufficient to enable party to maintain bill to cancel tax deed as a cloud on his title..... 15
- a person in possession of land claiming ownership is entitled to notice before tax deed is issued..... 15
- when a defendant should not be required to pay master's fees when his deed is canceled..... 16

TAXES.—See SPECIAL ASSESSMENTS.

- when equity has jurisdiction to enjoin collection of tax on original assessment by board of review—equity has jurisdiction if tax was unauthorized by law..... 27
- amount which a minor must contribute towards debts of estate should not be assessed as his personal estate—how such amount is measured..... 27

TAXES.—*Continued.*

	PAGE.
when a judgment in favor of widow against estate should not be assessed as her personal asset.....	27
tax-payer is entitled to have assessment made by board of assessors reviewed by board of review though he failed to file any schedule.....	415
jurisdiction of board of review over assessment made by board of assessors is revisory, but it cannot remit the penalty fixed by assessors for failure to file schedule..	415
rule where board of review changes an assessment made by the board of assessors which carries a fifty per cent penalty for failure to file a schedule.....	415
section 2 of the Inheritance Tax law does not exempt remainders after life estates but only certain specified life estates.....	571
what is the "beneficial interest" of a child in real estate under section 1 of Inheritance Tax law.....	571
person should be taxed, under Inheritance Tax law, only on the beneficial interest he receives.....	571

TENDER.

when defendant should not be required to pay master's fees when his tax deed is canceled.....	16
---	----

TORTS.—See NEGLIGENCE.

TOWNS.—See MUNICIPAL CORPORATIONS.

TRIAL.

what evidence in action for damages for frightening horse by a searchlight is sufficient to authorize the submission of the case to the jury.....	177
the matter of allowing amendments in chancery cases is largely within the chancellor's discretion.....	238
what evidence tends to show negligence by electric company in permitting live wire to fall.....	252
what evidence does not show liability of electric company for an injury to person from shock received by fallen live wire.....	253
when question of assumed risk is for the jury.....	373
what evidence tends to show negligence in switching a partly unloaded car of cinders.....	582
when question of defendant's notice of method in which car of cinders had been partly unloaded is for jury...	583
matter of cross-examination rests largely with trial court—rulings must be clearly prejudicial to work reversal...	611

TRUSTS.

PAGE.

- distinction between direction to an executor to sell and a devise to executor with power to sell..... 515
- when legal title remains in heirs and does not vest in the executor as trustee..... 515

UNDUE INFLUENCE.

- when law presumes undue influence by grantee..... 366
- law does not presume undue influence in case of a deed from parent to child—presumption in such a case must be based upon proof..... 366
- when grantee need not prove good faith—fact that father divides his property unequally is not evidence of mental weakness or undue influence..... 366
- when deed from widow to administrator's wife will not be set aside in equity except upon proof of actual influence by the administrator..... 592
- a charge of fraud in procuring a deed is inconsistent with a claim that the deed was voluntarily executed by the grantor through exercise of undue influence..... 605
- when fiduciary relation does not exist..... 605

USAGES.—See CUSTOMS.

VARIANCE.

- what is not such variance between averments and proof in a foreclosure proceeding as precludes foreclosure for the amount due..... 132

VENUE.

- a wife residing in foreign State may bring suit for separate maintenance in the county in Illinois where the husband resides..... 92

VERDICT.

- when verdict imposing fine of \$550 in malicious mischief prosecution is excessive..... 483

VESTED RIGHTS.

- vested rights of riparian owners in non-navigable stream cannot be destroyed by the State by making or declaring the stream navigable..... 291

VILLAGES.—See MUNICIPAL CORPORATIONS.

WAIVER.

PAGE.

pleading to declaration after demurrer is overruled waives demurrer and admits sufficiency of declaration.....	9
when filing of replication in foreclosure case will be held to have been waived.....	434
a defendant who fails to set up defense of <i>laches</i> in his answer waives such defense.....	556

WATERS.

it is a general presumption that the title of a purchaser from a riparian owner extends as far as the grantor owned, in both fresh and tidal waters.....	290
owner of land on both sides of river owns the bed of the stream in absence of any reservations.....	290
distinction as to ownership of bed of navigable and non-navigable streams—easement of navigation.....	290
a meander line is not ordinarily a boundary.....	290
a meander line provision of act of 1839, relating to canal lands, was superseded by the act of 1843.....	290
purchasers of canal lands sold under the act of 1843 and which lie along the Desplaines river own the bed of the river to the middle of the stream.....	290
a party alleging that stream is navigable has burden of proving that fact—what need not be shown.....	291
the navigability of a stream is determined with reference to its natural condition, unchanged by artificial channels which increase its volume.....	291
vested rights in non-navigable stream cannot be destroyed by making the stream navigable.....	291
rule where stream naturally navigable is improved so as to enlarge its usefulness.....	291
State cannot destroy riparian rights in a non-navigable stream by declaring it navigable.....	291
riparian owners are not required to forfeit their rights without compensation to aid in making the stream a navigable one.....	291
the Sanitary District act did not declare the Desplaines river to be a navigable stream.....	292
what is necessary to render a stream navigable.....	292
Desplaines river is not naturally a navigable stream....	292
an agreement for perpetual flowage is, in effect, a sale of an interest in land.....	292

WILLS.

distinction between direction to an executor to sell and a devise to executor with power to sell.....	515
---	-----

WILLS.—*Continued.*

PAGE.

- when will does not vest the legal title in the executor as trustee—when title remains in heirs..... 515
- when will creates a tenancy in common and not a joint tenancy—what provision of will strengthens view that estate was intended to be in common..... 543

WITNESSES.

- when an instruction as to disregarding testimony of witnesses who have been “successfully impeached” is not necessarily ground for reversal..... 113

WORDS AND PHRASES.

- word “heirs” need not be used in order to make an easement a perpetual one..... 42
- when an instruction as to disregarding testimony of witnesses who have been “successfully impeached” is not necessarily ground for reversal..... 113
- when a stock broker is a “winner,” under section 132 of the Criminal Code—it must appear that both parties intended to settle on differences, only..... 216
- limitation to heirs by that name as a class requires the inheritance so limited to vest in first taker..... 536
- when rule in *Shelly's case* applies to deed..... 537
- words used must clearly show intention to create a joint tenancy and not a tenancy in common..... 543
- what is the “beneficial interest” of a child in real estate under section 1 of Inheritance Tax law..... 571

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR
EXPLAINED IN THIS VOLUME.

A	PAGE.
Albany Railroad Bridge Co. v. People, 197 Ill. 199.....	320
Albert v. Thomas, 73 Md. 181.....	83
Aldrich v. Wright, 53 N. H. 398.....	492
American Express Co. v. Risley, 179 Ill. 295.....	262
American Trust Co. v. Minn. and N. W. R. R. Co. 157 Ill. 641.	480
Amos v. American Trust and Savings Bank, 221 Ill. 100....	136
Anderson v. Chicago Trust and Savings Bank, 195 Ill. 341. 391,	390
Ashbaugh v. Ashbaugh, 17 Ill. 476.....	99
Ashelford v. Willis, 194 Ill. 492.....	76
Aveling v. Knipe, 19 Ves. 441.....	546
Ayers v. Chicago Title and Trust Co. 187 Ill. 42.....	574

B	-
Baber v. Pittsburg, Cin. and St. Louis Ry. Co. 93 Ill. 342...	101
Baker v. Scott, 62 Ill. 86.....	539
Baldwin v. Hanecy, 204 Ill. 281.....	23
Ball, <i>In re</i> , 10 Wall. 557.....	326
Barber v. Allen, 212 Ill. 125.....	75, 72
Barclay v. Barclay, 184 Ill. 471.....	101
Barnes v. Suddard, 117 Ill. 237.....	480
Baucus v. Barr, 107 N. Y. 624.....	413
Baucus v. Stover, 89 N. Y. 1.....	413
Bauer v. Glos, 236 Ill. 450.....	26
Beazley v. Beazley, 3 Haggard's Eccl. 639.....	285
Becklenberg v. Becklenberg, 232 Ill. 120.....	99
Berry v. People, 36 Ill. 423.....	227
Billings v. People, 189 Ill. 472.....	573
Binz v. Tyler, 79 Ill. 248.....	14
Bishop v. Hilliard, 227 Ill. 382.....	371
Bixler v. Summerfield, 195 Ill. 147.....	162
Blair v. Carr, 162 Ill. 362.....	78
Blair v. City of Chicago, 201 U. S. 400.....	349

	PAGE.
Bliss v. Ward, 198 Ill. 104.....	507, 504, 498
Board of Trustees v. Haven, 5 Gilm. 548.....	318
Bond v. Moore, 236 Ill. 576.....	203
Booth v. People, 186 Ill. 43.....	227
Bozarth v. Landers, 113 Ill. 181.....	440
Bradish v. Grant, 119 Ill. 606.....	22, 20
Braun v. Craven, 175 Ill. 401.....	264, 260
Braxon v. Bressler, 64 Ill. 488.....	318
Brechbeller v. Wilson, 228 Ill. 502.....	513
Brown v. Cannon, 5 Gilm. 174.....	137
Brown v. Chadbourne, 31 Me. 9.....	332
Brown v. Welch, 18 Ill. 343.....	600
Brueggestratt v. Ludwig, 184 Ill. 24.....	24
Bullard v. Goffe, 20 Pick. 252.....	541
Burke Co. v. Catawba Lumber Co. 116 N. C. 731.....	321
Burlington v. Turner, 3 Lev. 28.....	495
Burnett v. Pratt, 22 Pick. 557.....	547
Burns v. State, 75 Ohio St. 407.....	397
Burrall v. American Telephone Co. 224 Ill. 266.....	152, 88
Burt v. Quisenberry, 132 Ill. 385.....	372, 371
Butler v. Butler, 161 Ill. 451.....	96
Butman v. Porter, 100 Mass. 337.....	431
Byrne v. Chicago General Ry. Co. 169 Ill. 75.....	508

C

Cady v. Springfield Water-works Co. 134 N. Y. 118.....	75
Cairo and St. Louis R. R. Co. v. Holbrook, 72 Ill. 419.....	14
Calef v. Thomas, 81 Ill. 478.....	492
Calumet and Chicago Dock Co. v. Russell, 68 Ill. 426.....	609
Camden and Amboy R. R. Co. v. Stewart, 21 N. J. Eq. 484..	235
Camp v. Small, 44 Ill. 37.....	13
Campbell v. Beck, 50 Ill. 171.....	98
Campbell v. Carter, 14 Ill. 286.....	447
Canale v. People, 177 Ill. 219.....	96
Canterberry v. Miller, 76 Ill. 355.....	351
Carney v. People, 210 Ill. 434.....	31
Carpenter v. Capital Electric Co. 178 Ill. 29.....	152
Carroll v. City of East St. Louis, 67 Ill. 568.....	168, 162, 161
Carter v. Thurston, 58 N. H. 104.....	326
Carterville, Village of, v. Cook, 129 Ill. 152.....	261
Cartwright v. McGown, 121 Ill. 388.....	97
Chalcraft v. Louisville, Ev. and St. L. R. R. Co. 113 Ill. 86..	102
Chandler v. Morey, 195 Ill. 596.....	466
Chapin v. Shafer, 49 N. Y. 407.....	401
Chapman v. Chapman, 129 Ill. 386.....	99
Chappel v. State, 35 Ark. 345.....	487

	PAGE.
Chicago and Alton Ry. Co. v. Bell, 209 Ill. 25.....	408
Chicago and Alton R. R. Co. v. Harrington, 192 Ill. 9...621, 131	
Chicago and Alton R. R. Co. v. House, 172 Ill. 601.....	407
Chicago and Alton R. R. Co. v. May, 108 Ill. 288.....	620
Chicago and Alton R. R. Co. v. People, 152 Ill. 230.....	479
Chicago and Alton R. R. Co. v. Swan, 176 Ill. 424.....	407
Chicago, Burl. and Quincy R. R. Co. v. Johnson, 103 Ill. 512.	620
Chicago, Burl. and Quincy R. R. Co. v. Lee, 87 Ill. 454.....	510
Chicago, City of, v. Barbian, 80 Ill. 482.....	465
Chicago, City of, v. Borden, 190 Ill. 430.....	570
Chicago, City of, v. Chi., R. I. and Pac. Ry. Co. 152 Ill. 561.	570
Chicago, City of, v. Hayward, 176 Ill. 130.....	466
Chicago, City of, v. Laughlin, 49 Ill. 172.....	327
Chicago, City of, v. Law, 144 Ill. 569.....	328
Chicago, City of, v. McGinn, 51 Ill. 266.....	318
Chicago, City of, v. Town of Cicero, 210 Ill. 290.....	509
Chicago, City of, v. Union Stock Yards Co. 164 Ill. 224.....	645
Chicago, City of, v. Ward, 169 Ill. 392.....508, 507, 503, 498	
Chicago City Ry. Co. v. Leach, 208 Ill. 198.....	408, 407
Chicago City Ry. Co. v. Mead, 206 Ill. 174.....	451
Chicago City Ry. Co. v. Ryan, 225 Ill. 287.....	116
Chicago and Eastern Ill. R. R. Co. v. Driscoll, 176 Ill. 330..	407
Chicago and Eastern Ill. R. R. Co. v. Kimmel, 221 Ill. 547... 407	
Chicago and Eastern Ill. R. R. Co. v. White, 209 Ill. 124.408, 405	
Chicago Hair and Bristle Co. v. Mueller, 203 Ill. 558.....	260
Chicago Mutual Life Indemnity Ass. v. Hunt, 127 Ill. 257..	400
Chicago and Northwestern Ry. Co. v. Gillison, 173 Ill. 264..	213
Chicago and Northwestern Ry. Co. v. Moranda, 93 Ill. 302..	620
Chicago and Northwestern Ry. Co. v. People, 91 Ill. 251....	645
Chicago, P. and St. L. R. R. Co. v. Woolridge, 174 Ill. 330.620, 619	
Chicago, Rock Is. and Pac. Ry. Co. v. Chicago, 148 Ill. 479..	465
Chicago, Rock Is. and Pac. Ry. Co. v. Joliet, 79 Ill. 25.....	644
Chicago, Rock Is. and Pac. Ry. Co. v. Rathneau, 225 Ill. 278.	211
Chicago, Rock Is. and Pac. Ry. Co. v. Strong, 228 Ill. 281... 407	
Chicago, St. Louis and Western R. R. Co. v. Gates, 120 Ill. 86.	466
Chicago Terminal R. R. Co. v. Reddick, 230 Ill. 105.....	407
Chicago Union Traction Co. v. Leach, 215 Ill. 184.....	213
Chicago and Western Ill. R. R. Co. v. Flynn, 154 Ill. 448... 407	
Chicago and Western Ill. R. R. Co. v. Guthrie, 192 Ill. 579..	467
Childs v. Dobbins, 55 Iowa, 205.....	401
Cicero, Town of, v. City of Chicago, 182 Ill. 301.....	509
Citizens' Telephone Co. v. Thomas, 99 S. W. Rep. 879.....	264
Clark v. Clark, 172 Ill. 355.....112, 111, 110	
Clark v. Jackson, 222 Ill. 13.....	520
Clay v. Hammond, 199 Ill. 370.....	151
Clews v. Jamieson, 192 U. S. 461.....	226

	PAGE.
Close v. Stuyvesant, 132 Ill. 607.....	521
Cochran v. Fogler, 116 Ill. 194.....	22
Collins v. Carlile, 13 Ill. 254.....	139
Commercial Mutual Accident Co. v. Bates, 176 Ill. 194.....	526
Commissioners of Highways v. Jackson, 165 Ill. 17.....	466
Commonwealth v. Walden, 57 Mass. 558.....	487
Commonwealth v. Williams, 110 Mass. 401.....	487
Condit v. Widmayer, 196 Ill. 623.....	31
Conner v. People, 20 Ill. 382.....	602
Cook v. Skelton, 20 Ill. 107.....	14
Cooper v. Cooper, 185 Ill. 163.....	100
Cooper v. Corbin, 105 Ill. 224.....	401
Cooper v. Gum, 152 Ill. 471.....	446
Coquard v. National Linseed Oil Co. 171 Ill. 480.....	250
Corcoran v. Lehigh Coal Co. 138 Ill. 390.....	355
Corning v. Troy Iron Co. 15 How. 451.....	224
Coryell v. Klehm, 157 Ill. 462.....	563, 154
Cotes v. Rohrbeck, 139 Ill. 532.....	26
Cover v. James, 217 Ill. 309.....	548
Cox v. Pierce, 120 Ill. 556.....	24
Craig v. VanBebber, 100 Mo. 584.....	401
Crane Co. v. Hogan, 228 Ill. 338.....	408

D

Dahlberg v. People, 225 Ill. 485.....	397
Daniel v. Green, 42 Ill. 472.....	151
Darst v. Murphy, 119 Ill. 343.....	154
Davenport v. Lamson, 21 Pick. 72.....	82
Davenport Bridge Ry. Co. v. Johnson, 188 Ill. 472.....	318
Davis v. Davis, 30 Ill. 180.....	99
Davis v. Illinois Collieries Co. 232 Ill. 284.....	618
Davis v. Nichols, 54 Ark. 358.....	40, 38
Dawson v. Vickery, 150 Ill. 398.....	154
Day v. Ft. Scott Investment and Improvement Co. 153 Ill. 293.....	526
Dean v. Walker, 107 Ill. 540.....	76
DeFlorez v. Raynolds, 8 Fed. Rep. 334.....	349
DeKalb, City of, v. Luney, 193 Ill. 185.....	643, 637
Delaney v. O'Donnell, 234 Ill. 109.....	151
Dempster v. Lansingh, 234 Ill. 381.....	571
Dickerson v. Evans, 84 Ill. 451.....	447
Diederich v. Rose, 228 Ill. 610.....	354
Diocese of Trenton v. Toman, 70 Atl. Rep. 606.....	83
Donk Bros. Coal Co. v. Thil, 228 Ill. 233.....	407
Dorsey v. Brigham, 177 Ill. 250.....	99
Downen v. Rayburn, 214 Ill. 342.....	72
Drainage Comrs. v. Kinney, 233 Ill. 67.....	32

	PAGE.
Druley v. Adam, 102 Ill. 177.....	325, 318
Duffy v. Kivilin, 195 Ill. 630.....	405
Dunham v. Dunham, 162 Ill. 589.....	285, 284

E

Eckhart v. Irons, 128 Ill. 568.....	72
Elgin, Aurora and Southern Trac. Co. v. Wilson, 217 Ill. 47.	262
Emory v. Keighan, 88 Ill. 516.....	20
Espenscheid v. Bauer, 235 Ill. 172.....	637
Evans v. Woodsworth, 213 Ill. 404.....	286

F

Fabrice v. Von der Brelie, 190 Ill. 460.....	445
Field v. Leiter, 118 Ill. 17.....	72
Finch v. Great Western Ry. Co. 5 L. R. Exch. 254.....	83
First Methodist Church v. Dixon, 178 Ill. 260.....	162
First Nat. Bank v. Adam, 138 Ill. 483.....	165
First Nat. Bank v. Burkett, 101 Ill. 391.....	488
First Nat. Bank v. Leech, 207 Ill. 215.....	390
First Nat. Bank v. Miller, 235 Ill. 135.....	14
Fitzgerald v. Fitzgerald, 100 Ill. 385.....	609
Flanagan v. Wells Bros. Co. 237 Ill. 82.....	580
Frazier v. Miller, 16 Ill. 48.....	527
Freeland v. Freeland, 128 Mass. 509.....	431
French v. Marstin, 32 N. H. 316.....	82
Fuller v. Chamier, L. R. 2 Eq. 682.....	541

G

Gage v. Abbott, 99 Ill. 366.....	151, 20, 18
Gage v. Caraher, 125 Ill. 447.....	76
Gage v. Cummings, 209 Ill. 120.....	520
Gage v. Davis, 129 Ill. 236.....	225
Gage v. Ewing, 114 Ill. 15.....	151, 19
Gage v. Goudy, 141 Ill. 215.....	26
Gage v. Lewis, 68 Ill. 604.....	526
Gage v. Perry, 93 Ill. 176.....	440, 439
Gardner v. Haynie, 42 Ill. 291.....	13
Gardt v. Brown, 113 Ill. 475.....	351
Garibaldi & Cuneo v. O'Connor, 210 Ill. 284.....	262
Garrett v. Farwell Co. 199 Ill. 436.....	391
Garrison v. Rudd, 19 Ill. 558.....	75
Gathman v. City of Chicago, 236 Ill. 9.....	407
Gavin v. Curtjn, 171 Ill. 640.....	203
Geary v. Bangs, 138 Ill. 77.....	13
Geer v. Goudy, 174 Ill. 514.....	552
Gerber v. Gerber, 155 Ill. 219.....	286

	PAGE.
Gibler v. City of Mattoon, 167 Ill. 18.....	383
Gibson v. Brown, 214 Ill. 330.....	520
Gibson v. Rees, 50 Ill. 383.....	237, 235
Glos v. Beckman, 183 Ill. 158.....	19
Glos v. Goodrich, 175 Ill. 20.....	19
Glos v. Huey, 181 Ill. 149.....	19
Glos v. Kemp, 192 Ill. 72.....	19
Glos v. Kenealy, 220 Ill. 540.....	26, 18
Glos v. McKerlie, 212 Ill. 632.....	26, 19
Glos v. O'Brien Lumber Co. 183 Ill. 211.....	26
Glos v. Randolph, 133 Ill. 197.....	19
Glover v. People, 204 Ill. 170.....	495
Gosselin v. City of Chicago, 103 Ill. 623.....	78
Grace & Hyde Co. v. Probst, 208 Ill. 147.....	212
Graham v. Anderson, 42 Ill. 514.....	609
Gray v. Jones, 178 Ill. 169.....	225
Green v. Spring, 43 Ill. 280.....	151
Green Co. v. Blodgett, 159 Ill. 169.....	13
Greene v. Canny, 137 Mass. 64.....	83
Griffin v. Griffin, 141 Ill. 373.....	112
Griffith v. Water-works Co. 8 Am. & Eng. Ann. Cas. 1130...	509
Gunnell v. Cockerill, 79 Ill. 79.....	356

H

Haigh v. Carroll, 209 Ill. 576.....	225
Hall v. Lacy, 3 Grant's Cas. 264.....	326
Hamilton v. Chicago, Burl. and Q. R. R. Co. 124 Ill. 235, 272,	79
Hamilton v. Jones, 125 Ind. 176.....	38
Harding v. American Glucose Co. 182 Ill. 551.....	163
Harding v. Harding, 144 Ill. 588.....	100
Harding v. Larkin, 41 Ill. 413.....	224
Harmon v. Auditor of Public Accounts, 123 Ill. 122.....	509
Harrass v. Edwards, 94 Wis. 459.....	521
Harris v. City of Chicago, 162 Ill. 288.....	467
Harris v. Flower, 74 L. J. Ch. 127.....	83
Hartley v. Chicago and Alton R. R. Co. 197 Ill. 440.....	407, 406
Harton v. Forest City Telephone Co. 59 S. E. Rep. 1022....	265
Harvey v. Aurora and Geneva Ry. Co. 186 Ill. 283.....	508
Haward v. Peavey, 128 Ill. 430.....	513
Hawkins v. Taber, 47 Ill. 459.....	237, 235
Hawley v. Simons, 102 Ill. 115.....	22
Hegerich v. Keddle, 99 N. Y. 258.....	38
Henderson v. Harness, 184 Ill. 520.....	564
Hensan v. Cooksey, 237 Ill. 620.....	445
Herr v. Payson, 157 Ill. 244.....	447
Heyman v. Heyman, 210 Ill. 524.....	136

	PAGE.
Higgins v. Wisner, 170 Ill. 220.....	565
Hill v. Hill, 166 Ill. 54.....	99
Hobson v. State, 44 Ala. 360.....	489
Hogan v. Chicago and Alton R. R. Co. 202 Ill. 206.....	144
Hollingsworth v. Koon, 117 Ill. 511.....	225
Holton v. Daly, 106 Ill. 131.....	41, 40
Hoosier Stone Co. v. Malott, 130 Ind. 21.....	81
Horner v. Keene, 177 Ill. 390.....	75
Hornish v. People, 142 Ill. 620.....	397
Hough v. Cook County Land Co. 73 Ill. 23.....	186, 163
Howell v. King, 1 Mod. 190.....	81
Hubbard v. Bell, 54 Ill. 110.....	332
Hubbell v. Warren, 8 Allen, 173.....	76
Hudson v. Green Hill Seminary, 113 Ill. 618.....	480
Hullinger v. Worrell, 83 Ill. 220.....	263
Hurd v. Ascherman, 117 Ill. 501.....	225
Hutchinson v. Howe, 100 Ill. 11.....	19
Hyslop v. Finch, 99 Ill. 171.....	102

I

Illinois Central R. R. Co. v. Siler, 229 Ill. 390.....	262
Illinois Ins. Co. v. Littlefield, 67 Ill. 368.....	570
Illinois Southern Ry. Co. v. Marshall, 210 Ill. 562.....	407
Illinois Steel Co. v. Coffey, 205 Ill. 206.....	408, 407
Illinois Steel Co. v. Ziemkowski, 220 Ill. 324.....	405
Imperial Building Co. v. Board of Trade, 238 Ill. 100.....	161
Indiana, Illinois and Iowa R. R. Co. v. Otstot, 212 Ill. 429.....	407, 405
Indianapolis Chair Manf. Co. v. Wilcox, 59 Ind. 429.....	401
Indianapolis and St. L. R. R. v. Morgenstern, 106 Ill. 216.....	406, 13

J

Jackson v. Schaubert, 7 Cow. 187.....	518
Jamieson v. Wallace, 167 Ill. 388.....	227
Jeffery v. Robbins, 167 Ill. 375.....	237, 235
Johnson v. State, 61 Ala. 9.....	487
Johnston v. Maples, 49 Ill. 101.....	225
Johnston v. Spicer, 107 N. Y. 185.....	429
Joliet and Chicago R. R. Co. v. Healy, 94 Ill. 416.....	332
Jones v. Gilbert, 135 Ill. 27.....	97
Jones v. Neely, 72 Ill. 449.....	439
Jones & Adams Co. v. George, 227 Ill. 64.....	621
Judge of Probate v. Sulloway, 68 N. H. 511.....	412

K

Kansas City v. Gilbert, 65 Kan. 469.....	264
Keller v. People, 204 Ill. 604.....	397
Kerfoot v. Billings, 160 Ill. 563.....	563, 153

	PAGE.
Kerfoot v. Breckenridge, 87 Ill. 205.....	466
Kester v. Stark, 19 Ill. 328.....	236
King v. Murphy, 140 Mass. 254.....	73
Kingman, <i>In re</i> Estate of, 220 Ill. 563.....	573
Kipley v. People, 215 Ill. 358.....	492
Kitson v. Farwell, 132 Ill. 327.....	526
Knapp v. Jones, 143 Ill. 375.....	166
Knowlton v. Hanbury, 117 Ill. 471.....	21, 20
Kouka v. Kouka, 221 Ill. 98.....	101
Kruse v. Kennett, 181 Ill. 199.....	227
Kuecken v. Voltz, 110 Ill. 264.....	75, 74, 72

L

Lake Erie and Western R. R. Co. v. Middleton, 142 Ill. 550..	407
Lake Shore and Mich. South. Ry. Co. v. Ouska, 151 Ill. 232..	131
Lambert v. Alcorn, 144 Ill. 313.....	571
Langan v. Enos Fire Escape Co. 233 Ill. 308.....	580
Lawrence v. People, 17 Ill. 172.....	602
Lehndorf v. Cope, 122 Ill. 317.....	513
Leland v. Felton, 1 Allen, 531.....	412
Lewis v. Coffee County, 77 Ala. 190.....	326
Lewis v. Montgomery, 145 Ill. 30.....	108
Lickmon v. Harding, 65 Ill. 505.....	609
Ligare v. Chicago, Madison and North. R. R. Co. 166 Ill. 249.	333
Lightcap v. Bradley, 186 Ill. 510.....	19
Lindsey v. Lindsey, 50 Ill. 79.....	372
Linnertz v. Dorway, 175 Ill. 508.....	191
Lister v. Glos, 236 Ill. 95.....	151
Littler v. City of Lincoln, 106 Ill. 353.....	271
Louisville and Nashville R. R. Co. v. Koelle, 104 Ill. 455....	74
Lyon v. Lyon, 230 Ill. 366.....	96
Lyon v. Robbins, 46 Ill. 276.....	519

M

Mallett v. Kaehler, 141 Ill. 70.....	600
Manlove v. Metzger, 124 Ill. App. 383.....	115
March v. Mayers, 85 Ill. 177.....	251
Marple v. Scott, 41 Ill. 50.....	439
Marston v. Brittenham, 76 Ill. 611.....	609
Martel v. City of East St. Louis, 94 Ill. 67.....	645
Martin v. Gilmore, 72 Ill. 193.....	519
Martin v. Martin, 202 Ill. 382.....	144
Martin v. People, 5 Blackb. 35.....	330
McAuley v. Columbus, Chi. and Ind. Cen. Ry. Co. 83 Ill. 348.	480
McCarthy v. Spring Valley Coal Co. 232 Ill. 473.....	621, 619
McCarty v. Frazer, 62 Mo. 263.....	413

	PAGE.
McClamrock v. Gregory, 119 Ind. 503.....	413
McClelland v. McClelland, 176 Ill. 83.....	446
McComb v. McComb, 238 Ill. 555.....	457
McCord v. Massey, 155 Ill. 123.....	137
McCullough v. Broad Exchange Co. 101 N. Y. App. 566....	84
McDeed v. McDeed, 67 Ill. 545.....	96
McGaughey v. Jacoby, 54 Ohio St. 487.....	412
McGillis v. Hogan, 190 Ill. 176.....	25
McHany v. Schenk, 88 Ill. 357.....	356
McIntyre v. Sholty, 121 Ill. 660.....	41
McLean County Coal Co. v. City of Bloomington, 234 Ill. 90.	73
McNulta v. Ensich, 134 Ill. 46.....	174
McNulta v. Lockridge, 137 Ill. 270.....	130
Mead v. Altgeld, 136 Ill. 298.....	521
Mendota Club v. Anderson, 101 Wis. 479.....	326
Merchants' Improvement Co. v. Exch. Bldg. Co. 210 Ill. 26..	165
Merrill v. Rumsey, 1 Keb. 688.....	541
Metropolitan Life Ins. Co. v. People, 209 Ill. 42.....	175
Mette v. Feltgen, 148 Ill. 357.....	548, 547
Middleton v. Pritchard, 3 Scam. 510.....	318
Miles v. Miles, 200 Ill. 524.....	101
Miller v. Craig, 36 Ill. 109.....	372
Milwaukee and St. Paul R. R. Co. v. Kellogg, 94 U. S. 469...	261
Mittel v. Karl, 133 Ill. 65.....	548, 513
Mobile, County of, v. Kimball, 102 U. S. 691.....	327
Mobile and Ohio R. R. Co. v. Massey, 152 Ill. 144.....	407
Moe v. Smiley, 125 Pa. 136.....	38
Moerschbaeher v. Royal League, 188 Ill. 9.....	144
Monmouth Mining and Manf. Co. v. Erling, 148 Ill. 521....	213
Monroe v. Poorman, 62 Ill. 523.....	609
Montello, <i>In re</i> , 20 Wall. 431.....	326
Moore v. Sanborne, 2 Mich. 519.....	332
Morgan v. King, 35 N. Y. 454.....	330
Morgan v. Smith, 11 Ill. 194.....	137
Morrison v. Morrison, 140 Ill. 560.....	600
Mullins v. People, 110 Ill. 42.....	397
Murray v. Preston, 106 Ky. 561.....	330
Myatt v. Walker, 44 Ill. 485.....	372

N

National Home Bldg. Ass. v. Home Savings Bank, 181 Ill. 35.	162
Nevius v. Gourley, 95 Ill. 206.....	430
Newton v. State, 3 Tex. App. 245.....	487
Nichols v. Otto, 132 Ill. 91.....	563
Northcot v. State, 43 Ala. 330.....	487
Northern Trust Co. v. Palmer, 171 Ill. 383.....	38
Norton v. Wiswall, 14 How. Pr. 42.....	38

O

	PAGE.
O'Connell v. O'Connor, 191 Ill. 215.....	440
Oliphant v. Liversidge, 142 Ill. 160.....	609, 371
Olive v. State, 86 Ala. 88.....	330
Olsen v. People, 219 Ill. 40.....	98
Oswald v. Wolf, 126 Ill. 542.....	75
Owen v. Village of Brookport, 208 Ill. 35.....	272

P

Page v. People, 99 Ill. 418.....	225
Parker v. Irick, 10 N. J. Eq. 269.....	413
Parker v. Nightingale, 6 Allen, 341.....	76
Peacock v. People, 83 Ill. 331.....	602
Pearce v. City of Chicago, 169 Ill. 631.....	467
Pearce v. Foote, 113 Ill. 228.....	227
Penn Plate Glass Co. v. Rice Co. 216 Ill. 567.....	451, 225
Pennsylvania Co. v. Keane, 143 Ill. 172.....	620, 223
Pennsylvania Co. v. Sloan, 125 Ill. 72.....	175
Pensoneau v. Pulliam, 47 Ill. 58.....	563
People v. Beattie, 137 Ill. 553.....	284
People v. Central Union Telephone Co. 232 Ill. 260.....	349
People v. Chicago Telephone Co. 220 Ill. 238.....	349
People v. City of Rock Island, 215 Ill. 488.....	644
People v. Dulaney, 96 Ill. 503.....	481
People v. Glann, 70 Ill. 232.....	481
People v. Healy, 128 Ill. 9.....	526
People v. Hoffman, 116 Ill. 587.....	533
People v. Illinois and St. L. Railroad and Coal Co. 122 Ill. 506.....	481
People v. Johnson, 100 Ill. 537.....	481
People v. Noonan, 238 Ill. 303.....	468
People v. Olsen, 6 Utah, 284.....	489
People v. Pullman's Palace Car Co. 175 Ill. 125.....	162
People v. River Mill and Lumber Co. 107 Cal. 221.....	330
People v. Rome, Water. and Ogdens. R. R. Co. 103 N. Y. 95.....	479
People v. Rose, 211 Ill. 252.....	481
People v. Strassheim, 240 Ill. 279.....	575
People v. Walsh, 96 Ill. 232.....	509, 508
People v. Watkins, 19 Ill. 117.....	603
People v. Wieboldt, 233 Ill. 572.....	645, 74
Phoenix Ins. Co. v. Perkey, 92 Ill. 164.....	14
Piatt, County of, v. Goodell, 97 Ill. 84.....	645
Pierpont v. Lovelace, 72 N. Y. 211.....	321
Pittsburg, Cin., Chi. and St. L. Ry. Co. v. Kinnare, 203 Ill. 388.....	620
Pittsburg, Cin., Chi. and St. L. Ry. Co. v. Robson, 204 Ill. 254.....	131
Pool v. Docker, 92 Ill. 501.....	225

	PAGE.
Prince v. Cutler, 69 Ill. 267.....	24
Pullman Palace Car Co. v. Laack, 143 Ill. 242.....	213, 211
Puterbaugh v. Elliott, 22 Ill. 157.....	251

Q

Queen v. Smith, 7 Nova Scotia, 729.....	489
---	-----

R

Rader v. Yeargin, 85 Tenn. 486.....	413
Rector v. Hartford Deposit Co. 190 Ill. 380.....	186, 164
Reigard v. McNeil, 38 Ill. 400.....	563
Reise v. Enos, 76 Wis. 634.....	83
Reiter v. Standard Scale Co. 237 Ill. 374.....	618
Republic Iron and Steel Co. v. Lee, 126 Ill. App. 297.....	373
Republic Iron and Steel Co. v. Lee, 227 Ill. 246.....	373
Reynesh v. Martin, 3 Atk. 330.....	430
Reynolds v. McCurry, 100 Ill. 356.....	401
Rice v. Rice, 108 Ill. 199.....	390
Riverside Co. v. Townshend, 120 Ill. 9.....	23
Riverside, Village of, v. McLain, 210 Ill. 308.....	508
Riverside, Village of, v. Watson, 157 Ill. 669.....	637
Robinson v. Weeks, 56 Mo. 102.....	401
Rockford, City of, v. Tripp, 83 Ill. 247.....	263
Rodman v. Quick, 211 Ill. 546.....	225
Roemheld v. City of Chicago, 231 Ill. 467.....	144
Rogers v. Cleveland, Cin., Chi. and St. L. Ry. Co. 211 Ill. 126.....	408
Rogers v. Down, 9 Mod. 292.....	541
Ruchisky v. DeHaven, 97 Pa. St. 202.....	401
Rucker v. People, 224 Ill. 131.....	396
Russell v. City of Lincoln, 200 Ill. 511.....	78
Russell v. Sunbury, 37 Ohio St. 372.....	38

S

Sale v. Fike, 54 Ill. 292.....	519
Sanitary District v. Pitts., Ft. W. and Chi. Ry. Co. 216 Ill. 575.....	633
Savage v. Chicago and Joliet Ry. Co. 238 Ill. 392.....	41
Schmidt v. Brown, 226 Ill. 590.....	78
Schmidt v. Schmidt, 29 N. J. Eq. 496.....	285
Schnell v. City of Rock Island, 232 Ill. 89.....	563, 153
Schoonhoven v. Pratt, 25 Ill. 379.....	563
Schreiber v. Chicago and Evanston R. R. Co. 115 Ill. 340....	466
Schulte v. Warren, 218 Ill. 108.....	332, 326, 321
Sears v. Vaughan, 230 Ill. 572.....	371
Seymour v. Union Stock Yards Co. 224 Ill. 579.....	211
Shenango Bridge Co. v. Paige, 83 N. Y. 178.....	330
Shields v. Bush, 189 Ill. 534.....	460

	PAGE.
Shillinger v. Shillinger, 14 Ill. 147.....	284
Shoninger Co. v. Mann, 219 Ill. 242.....	580
Shurtleff v. City of Chicago, 190 Ill. 473.....	468
Shurtleff v. Millard, 12 R. I. 272.....	401
Siegel, Cooper & Co. v. Trcka, 218 Ill. 559.....	263
Simpson v. Godmanchester, L. R. App. (1897) 696.....	84
Slater v. Gruger, 165 Ill. 329.....	548
Smith v. Chicago, Peoria and St. Louis Ry. Co. 236 Ill. 369..	470
Smith v. M. and K. Telephone Co. 113 Mo. App. 429.....	264
Smith v. Sackett, 15 Ill. 528.....	224
Snap v. People, 19 Ill. 80.....	487
Snowball v. People, 147 Ill. 260.....	533
Snyder v. Gaither, 3 Scam. 91.....	13
South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456.....	173
South Park Comrs. v. Dunlevy, 91 Ill. 49.....	466
Southern Bank of St. Louis v. Humphreys, 47 Ill. 227.....	519
Spalding v. Macomb and W. Ill. Ry. 225 Ill. 585, 563, 153, 152,	88
Spring Valley Coal Co. v. Robizas, 207 Ill. 226.....	621
State v. Boies, 1 Am. & Eng. Ann. Cas. 491.....	487
State v. Churchill, 98 Pac. Rep. 853.....	489
State v. Coleman, 29 Utah, 417.....	489
State v. Landreth, 4 N. C. 331.....	487
State v. Leslie, 138 Iowa, 104.....	489
State v. Linde, 54 Iowa, 139.....	490
State v. Payne, 31 S. W. Rep. 797.....	349
State v. Pierce, 7 Ala. 728.....	487
State v. Prater, 130 Mo. App. 348.....	489
State v. Taylor, 118 Mo. 153.....	397
State v. Wilcox, 11 Tenn. 278.....	487
St. Louis National Stock Yards v. Godfrey, 198 Ill. 288..	211, 131
St. Louis, Peoria and N. Ry. Co. v. Dorsey, 189 Ill. 251..	621, 620
Stratton v. Currier, 81 Me. 497.....	326
Street v. French, 147 Ill. 342.....	521, 520
Street v. Thompson, 229 Ill. 613.....	225
Sullings v. Sullings, 91 Mass. 234.....	431
Swift & Co. v. Foster, 163 Ill. 50.....	620
Swift & Co. v. Gaylord, 229 Ill. 330.....	378
Swift & Co. v. Madden, 165 Ill. 41.....	378
Swigert v. County of Hamilton, 130 Ill. 538.....	481

T

Taggart v. Blair, 215 Ill. 339.....	564, 563
Temple v. Scott, 143 Ill. 290.....	513
Thomas v. Fame Ins. Co. 108 Ill. 91.....	175, 174
Thomas v. State, 14 Tex. App. 200.....	494
Thomas v. St. Louis, Belle. and South. Ry. Co. 164 Ill. 634..	479

	PAGE.
Thomas v. Whitney, 186 Ill. 225.....	597
Thompson v. Calhoun, 216 Ill. 161.....	126
Thompson v. Hemenway, 218 Ill. 46.....	23
Thunder Bay River Booming Co. v. Speechly, 31 Mich. 36..	325
Tilley v. Bridges, 105 Ill. 336.....	21, 20
Tinker v. Forbes, 136 Ill. 221.....	75
True & True Co. v. Woda, 201 Ill. 315.....	263
Tucker v. People, 122 Ill. 583.....	96

U

Ulrich v. Muhlke, 61 Ill. 499.....	447
Umlauf v. Umlauf, 103 Ill. 651.....	101
Union Mutual Life Ins. Co. v. Kirchoff, 133 Ill. 368.....	563
Union Mutual Life Ins. Co. v. White, 106 Ill. 67.....	563
United States v. Rio Grande Irrigation Co. 174 U. S. 690...	326
United States Trust Co. v. Lee, 73 Ill. 142.....	168, 162

V

Vangieson v. Henderson, 150 Ill. 119.....	539
Vanhorne v. Darrence, 2 Dall. 317.....	430
Venice, City of, v. Ferry Co. 216 Ill. 345.....	272
Verble v. Dillow, 218 Ill. 537.....	390
Vogler v. Geiss, 51 Md. 407.....	73
Vose v. Strong, 144 Ill. 108.....	225

W

Wabash, St. Louis and Pac. Ry. Co. v. Peyton, 106 Ill. 534..	470
Waggoner v. Waggoner, 76 Md. 311.....	287, 286
Walker v. Board of Public Works, 16 Ohio, 540.....	330
Walker v. Converse, 148 Ill. 622.....	19
Walker v. Illinois Central R. R. Co. 215 Ill. 610.....	73
Walker, <i>In re</i> , 125 Cal. 242.....	413
Walker v. Shepard, 210 Ill. 100.....	597
Walton v. Follansbee, 131 Ill. 147.....	513
Ward v. Butler, 239 Ill. 462.....	540, 539
Watkins v. Dorris, 54 L. R. A. 199.....	330
Watson v. Watson, 118 Ill. 56.....	609
Way v. Way, 64 Ill. 406.....	285, 99
Webber v. Vogel, 159 Pa. St. 235.....	83
Weber v. Baird, 208 Ill. 209.....	31
Webster v. Fleming, 178 Ill. 140.....	76
Welliver v. Jones, 166 Ill. 80.....	513
West Chicago Park Comrs. v. City of Chicago, 152 Ill. 392..	508
Wetherell v. Devine, 116 Ill. 631.....	533
Wheeler v. Wheeler, 18 Ill. 39.....	284
Whitaker v. McBride, 197 U. S. 510.....	320

	PAGE.
Whitaker v. Miller, 83 Ill. 381.....	600
White v. New Bedford Cotton-Waste Corp. 178 Mass. 20...	401
White v. White, 231 Ill. 298.....	555
Whittemore v. People, 227 Ill. 453.....	167
Wilcoxon v. Wilcoxon, 230 Ill. 93.....	251
Williams v. James, 2 L. R. C. P. 577.....	82
Wilmington Water Power Co. v. Evans, 166 Ill. 548.....	345
Wilson v. Board of Trustees, 133 Ill. 443.....	509
Wilson v. Roots, 119 Ill. 379.....	351
Winkelman v. City of Chicago, 213 Ill. 360.....	468
Wolff Manf. Co. v. Wilson, 152 Ill. 9.....	263
Wood v. People, 16 Ill. 171.....	602
Woods v. State, 27 Tex. App. 586.....	494
Woodward v. Seely, 11 Ill. 157.....	345
Woolverton v. Taylor, 132 Ill. 197.....	108
Wright v. Griffey, 147 Ill. 496.....	23
Wright v. Lang, 66 Ala. 389.....	412
Wright v. State, 30 Ga. 25.....	494

Y

Yates v. Milwaukee, 10 Wall. 497.....	330
York v. Ferner, 59 Iowa, 487.....	432



